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TWENTY-FIFTH ANNIVERSARY OF JUSTICE HARLAN'S APPOINTMENT TO THE SUPREME COURT.

A few weeks ago the bar of the Supreme Court of the United States entertained Mr. Justice Harlan at dinner in commemoration of the completion of his quarter of a century's service as a justice of that august tribunal.

On this occasion, Justice Harlan gave expression to his opinion as to the commanding position of the supreme court in shaping the destinies of this republic. There has been much discussion on this point, some contending that the supreme court is the final arbiter of every question that touches the constitution, whether involving the policy of executive or legislative action or not, others arguing that it was not intended that this court should have anything to do with shaping political destinies of the government. Justice Harlan inclines toward the former view. He said: "Permit me to say that there has been no moment during my term of service when I have not been deeply sensible of the awful responsibility resting upon every member of that court. The power of the supreme court for good, as well as for evil, can scarcely be exaggerated. If it cannot actually shape the destiny of our country, it can exert a commanding influence in that direction. It can by its judgments strengthen our institutions in the confidence and affections of the people, or, more easily than any other department of the government, it can undermine the foundations of our governmental system. It can undo the work of the fathers by abrogating old canons of constitutional construction that have helped to make this the foremost nation of the earth. It can—to use the words of Chief Justice Marshall—'explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use.'" Further on, pursuing the same idea, Justice Harlan says: "In the early history of our country it was the fear of some that the supreme court, exerting the enormous power conferred upon it, might ultimately so change our form of government as to destroy or endanger the essential rights of the states and imperil those fundamental rights of life, liberty and property, which belong to free men. But few, if any, now entertain such apprehensions, and there is practical unanimity among statesmen, jurists and the people, as to the essential nature of our institutions. No American lawyer now questions the supremacy of the constitution in respect of every subject entrusted to that government, or the wisdom of the provision made for its final interpretation."

We concur most heartily in these expressions of opinion on this subject by Justice Harlan and can conceive of no reasonable grounds on which the opponents of this view can stand. And yet in reputable law journals and in speeches by great (?) lawyers, sharp and unbridled criticism upon the extent of authority thus assumed by the United States Supreme Court has been indulged and even applauded. So long as that court maintains the high standard of character and intelligence represented by such men as Marshall, Story, Miller, Field and Harlan, there will be no need to fear any untoward or dangerous exercise of the exalted power conferred upon this tribunal.

MENTAL OR MAGNETIC HEALING AS A FRAUDULENT SCHEME TO BE EXCLUDED FROM THE MAILS.

Some time ago we took a firm position against arbitrary enactments under the police power prohibiting the practicing of certain schools of medicine which the majority of people might think ineffective, such as magnetic healing, Christian science, osteopathy, etc. (53 Cent. L. J. 361, 459; 54 Cent. L. J. 122.) Another phase of this question has just been discussed by the United States Supreme Court in the recent case of American School of Magnetic Healing v. McAnnulty, 23 Sup. Ct. Rep. 33. In that case the Postmaster General by special order prohibited the delivery of letters addressed to the plaintiff corporation under the provision of the federal statutes authorizing the retention of letters directed to any person obtaining money through the mails by false pretenses. It seems that the plaintiff corporation was advertising and practicing directly and by correspondence the system known as magnetic healing, a system which assumes to heal disease

through the influence of the mind over the body. The supreme court in denying the right to the postmaster to set in judgment on the effectiveness or non-effectiveness of the various schools of medicine, gives expression to some very interesting and liberal views as to the legal status of the various schools of medicine. The court says:

"The bill in this case avers that those who have business with complainants are satisfied with their method of treatment, and are entirely willing that the money they sent should be delivered to the complainants. In other words, they seem to have faith in the complainant's treatment, and in their ability to heal as claimed by them. If they fail, the answer might be that all human means of treatment are also liable to fail, and will necessarily fail when the appointed time arrives. There is no claim that the treatment by the complainants will always succeed. As the effectiveness of almost any particular method of treatment of disease is, to a more or less extent, a fruitful source of difference of opinion, even though the great majority may be of one way of thinking, the efficacy of any special method is certainly not a matter for the decision of the Postmaster General within these statutes relative to fraud.

Vaccination is believed by many to be a preventive of smallpox, while others regard it as unavailing for that purpose. Under these statutes could the Postmaster General, upon evidence satisfactory to him, decide that it was not a preventive, and exclude from the mails all letters to one who practiced it and advertised it as a method of prevention, on the ground that the moneys he received through the mails were procured by false pretenses?

Again, there are many persons who do not believe in the homeopathic school of medicine, and who think that such doctrine, if practiced precisely upon the lines set forth by its originator, is absolutely inefficacious in the treatment of diseases. Are homeopathic physicians subject to be proceeded against under these statutes, and liable, at the discretion of the Postmaster General upon evidence satisfactory to him, to be found guilty of obtaining money under false pretenses, and their letters stamped as fraudulent and the money contained therein as payment for their professional services sent back to the writers of the letters? And, turning the question around, can physicians of what is called the "old school" be thus proceeded against? Both of these different schools of medicine have their followers, and many who believe in the one will pronounce the other wholly devoid of merit. But there is no precise standard by which to measure the claims of either, for people do recover who are treated according to the one or the other school. And so, it is said, do people recover who are treated under this mental theory. By reason of it? That cannot be averred as matter of fact. Many think they do. Others are of the contrary opinion. Is the Postmaster General to decide the question under these statutes?

It may, perhaps, be urged that the instances above cited by way of illustration do not fairly represent the case now before us, but the difference is one of degree only. It is a question of opinion in all the cases, and although we may think the opinion may be better founded and based upon a more intelligent and a longer experience in some cases than in others, yet after all, it is, in each case, opinion only, and not existing facts with which these cases deal. There are, as the bill herein shows, many believers in the truth of the claims set forth by complainants, and it is not possible to determine as a fact that those claims are so far unfounded as to justify a determination that those who maintain them and pratice upon that basis obtain their money by false pretenses within the meaning of these statutes."

NOTES OF IMPORTANT DECISIONS.

RES ADJUDICATA—WHAT ARE THE NECESSARY POINTS OF CONTROVERSY OF A CASE INVOLVED IN A JUDGMENT THEREIN, WHERE THERE ARE SEVERAL DEFENSES. — Few questions occasion the difficulty equal to those so often arising in applying the now well-settled rules of law relating to the subject of *res adjudicata*. In the case of Mitchell v. La Follett, 38 Oreg. 178, 63 Pac. Rep. 54, a buyer of produce brought an action against the seller for failure to deliver. Defendant, in addition to a general denial, offered an affirmative defense, based on a breach by plaintiff in refusing to receive the produce. There was a judgment in defendant's favor for costs and disbursements. In the subsequent and recent case of La Follett v. Mitchell, 69 Pac. Rep. 916, the question before the court was whether the defendant in the former suit could in a subsequent action again bring up the matter alleged in his

affirmative defense in the former action, *i. e.* could the defendant in a subsequent action sue the plaintiff in the former action for refusal to receive the goods. The court said he could. Bean, J., in speaking for the Supreme Court of Oregon, says:

"There is no dispute under the authorities as to the rule of law that an issue once determined in a court of competent jurisdiction cannot be again litigated between the same parties. But there is a difference, sometimes overlooked, between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand and its effect as an estoppel in another action between the same parties upon a different claim or demand. In the former case the judgment, if upon the merits, is an absolute bar, and concludes the parties and their privies, not only as to every matter that was actually litigated, but as to any other that might have been litigated. Where, however, the action, although between the same parties, is upon a different claim or demand, the judgment in the prior action operates as a bar or estoppel only as to those matters directly in issue, and not those collaterally litigated. This distinction is pointed out by Mr. Justice Field, with his usual clearness, in Cromwell v. Sac Co., 94 U. S. 351, 24 L. Ed. 195, and was applied by this court in Glenn v. Savage, 14 Oreg. 567, 13 Pac. Rep. 442, and Applegate v. Dowell, 15 Oreg. 513, 522, 16 Pac. Rep. 651. Before, therefore, the judgment in Mitchell v. La Follett, *supra*, can be invoked as a bar to this action, it must appear that the question now in issue was directly involved in that case and determined therein. Within the meaning of the rule relied upon, a fact or a matter in issue is said to be 'that upon which the plaintiff proceeds by his action and which the defendant controverts in his pleadings.' Garwood v. Garwood, 29 Cal. 514; King v. Chase, 15 N. H. 9, 41 Am. Dec. 675. Now, in the former action, Mitchell proceeded and based his right to recover upon an alleged breach of the contract by La Follett on the 27th of May. That was the material allegation in the complaint, which the latter controverted by his answer, and was the subject of inquiry before the court and jury. If the finding and judgment had been in favor of Mitchell, La Follett would be estopped from alleging in this action anything to the contrary; but, as the as the action resulted in a final judgment in favor of La Follett, it constituted an adjudication that there had been no breach of the contract on his part, but did not determine that Mitchell himself had not violated the terms and conditions thereof. That question was not involved in the former controversy, and the judgment therein is no bar to this action. The plaintiff was not obliged to set up in the former action a breach of the contract by the defendant for the purpose of recovering damages therefor. Freem. Judgm. (3d Ed.) §§ 227, 228. And as said by Mr. Justice Field in Cromwell v. Sac Co., *supra:* 'It is not believed that there are any cases going to the extent that, because in the prior action a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On principle a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause because it might have been determined in the first action.' So we conclude that the judgment in the former action between the same parties to this record is in no way a bar to this, because the point now in controversy was neither involved nor litigated there."

INSURANCE—PAROL WAIVER OF CONDITIONS OF POLICY WITH OR WITHOUT AUTHORITY OF AGENTS OR OFFICERS.—A full and valuable discussion of the very important and often litigated question stated as the subject of this note is to be found in the opinion of Hainer, J., speaking for the Supreme Court of Oklahoma in the case of Liverpool, etc., Insurance Co. v. Lumber Co., 69 Pac. Rep. 938. This case was originally decided in 69 Pac. Rep. 936, but on a rehearing, the former opinion was set aside. It seems that what most influenced the mind of the court in receding from its former opinion was the masterly opinion of Shiras, J., in the recent case of Northern Assurance Co. v. Bldg. Assn., 183 U. S. 308, 22 Sup. Ct. Rep. 133. Justice Hainer sets out almost in full the opinion of Justice Shiras in this last mentioned case and comments upon it very freely. He also exhaustively reviews the authorities in conflict with this opinion and in concluding lays down the following general rules:

1. It is a fundamental rule of law that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument.

2. When parties have deliberately entered into a written contract in such terms as import a legal obligation, without any uncertainty as to the object or intent of such transaction, it is conclusively presumed that the whole transaction of the parties and the extent and manner of their undertaking was reduced to writing; and all oral testimony of previous negotiations or statements between the parties, or contemporaneous therewith, are merged in the written instrument, in the absence of fraud or mutual mistake of the parties.

3. A contract in writing, if its terms are free from doubt or ambiguity, must be permitted to speak for itself, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; and this principle is applicable to contracts of insurance.

4. A stipulation in an insurance policy which reads, "Warranted by the assured that a clear space of 200 feet, tramways excepted, shall al-

ways be maintained between the lumber hereby insured and any mill or other manufacturing establishment, or else this policy shall be void," is a reasonable and competent provision to insert or attach to the policy.

5. It is reasonable and competent for insurance companies to provide in their policies that no officer, agent or other representative of the company shall have the power to waive such stipulation of warranty, unless indorsed thereon or added thereto.

6. Where an insurance policy contains such a stipulation of warranty, and provides that no officer, agent or other representative of the company shall have the power to waive any condition or provision of the policy, unless such waiver shall be written upon or attached thereto, such limited grant of authority is the measure of their power.

7. Where such limitation is expressed in the policy, the assured is presumed to have notice and knowledge of such limitation, and is bound thereby.

8. Where the waiver relied on is the act of an agent of the insurance company, it must be shown that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the unauthorized action of the agent,

In commenting on the position assumed by the United States Supreme Conrt, Justice Hainer says: "The rule announced by the Supreme Court of the United States in the case of Northern Assur. Co. v. Grand View Bldg. Assn., *supra*, where it was declared that, 'where the waiver relied on is the act of an agent, it must be shown, either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent', is not only directly in point, but is decisive of this question. We do not deem it necessary to further review the state decisions, which are in irreconcilable conflict with the latest expression of the Supreme Court of the United States upon this important subject. We think that the decision of the Supreme Court of the United States is the correct and sound rule to adopt, and that the doctrine announced by the later cases of a number of the state courts and some of the federal courts is a wide departure from the true interpretation of valid written contracts, and is violative of the fundamental principles of the law of agency. The rule of law which admits parol testimony to vary or change the terms of a valid written instrument, whose terms are free from doubt or ambiguity, repeals the fundamental principle that the written instrument must control over the verbal negotiations and statements made prior to and contemporaneous with the execution of the instrument. It also contravenes the fundamental doctrine that an agent cannot act beyond the scope of his authority. It is also in conflict with the doctrine that a principal has the undoubted authority to limit the powers of an agent in a contract, and such grant of authority is the measure and limit of the agent's power in such matter, and, where the limitations of the agent are expresed in the instrument, the parties thereto are bound to have full notice and knowledge thereof."

SPECIFIC PERFORMANCE OF BUILDING CONTRACTS.[1]

Part I. *Origin and Growth of Specific Performance.*—The remedy of specific performance is not of ancient origin. The Roman law did not offer it, but gave a title to damages as the sole right resulting from non-performance of a contract. In like manner the early common law of England made no attempt actually to enforce the performance of contracts, but gave to the injured party

[1] This thesis is an attempt to present in a clear and concise statement the principles governing courts of equity in their control over building contracts. The writer has examined the case law from the earliest reported decision (1469), down to the present time, in which the question of specific performance of binding contracts was before the court, and while the very early cases are of little aid in determining the rules by which courts of equity take jurisdiction of such cases, yet they are cited, and some commented upon to show the history and growth of this remedy as applied to binding contracts. After an examination of the authorities, the writer deems it best to divide contracts of this character. Part two of this article treats of contracts arising where an owner of land engages another to build on this land, while part three contains a discussion of contracts where an owner of land, or one having a possessory interest in same, agrees to build on that land in consideration of certain benefits or privileges. The writer contends that contracts of the nature discussed in part two should not be specifically enforced at the present day; while contracts embraced in part three, if certain and definite in terms, may be enforced in the discretion of the court of equity.

only the right to satisfaction in damages. Sir Henry Maine, in his work on ancient law, has shown how slow was the introduction into jurisprudence of any provision for the enforcement of contracts, and how that introduction was due to the increase of commercial activity. The same spirit of commerce which led to the enforcement of contracts, also brought in the notion that money is an equivalent of everything, is an universal, common measure, and this, says Frye, probably led to the arrested growth of the remedies for their breach and the confining of such remedies for the most part to the payment of money or the delivery of a chattel.

Definition of Specific Performance.—What is specific performance? Frey, in his work, says: "Specific performance of a contract is its actual execution according to its stipulations and terms." Such actual execution is enforced under the equitable jurisdiction vested in the courts by directing the party in default to do the very thing which he contracted to do.

In the very early cases reported in the books, in which the court has decreed specific performance of building contracts, the division or classification which the writer makes in the note which precede the discussion of this subject is not recognized; and in fact, it seems that the fundamental basic principles which have governed the jurisdiction of equity courts from the establishment of that court down to the present time, had been lost sight of. Courts of equity, from an early date down to 1788, had never refused to decree performance of building contracts. The courts did not concern themselves with the question of jurisdiction, as to whether the remedy at law was adequate or not, but took jurisdiction of such cases and decided them as a matter of right in the complaining party, and not as within the discretion of the court. From such cases we can discover no rule or test by which we may determine the jurisdiction of equity in the specific performance of building contracts. To quote from one decision, it would seem that their power was unlimited, which is as follows: "But this cannot be called a hardship, because it will put the defendant to an expense, for it is merely through his own default, and this court only compels him to perform his own agreement which he has entered into for valuable consideration; and it would be suffering him to take advantage of his own wrong if he were not compelled." However, Sir Lloyd Kenyon, in deciding the case of Errington v. Aynesly, in 1788, laid down the rule that such contracts will not be enforced because the remedy at law is adequate, and he further says that, "B" can do what "A" won't. The chancellor said that no case of specific performance of building contracts appeared in the books, which statement is erroneous, as will be shown later in the discussion of this subject.

Part II. *Contracts Arising Where an Owner of Land Engages Another to Build Upon His Land—Discussion of Early Important English Cases.*—Returning to the discussion, we will investigate the authorities under our first proposition, that is, where B contracts to build on A's land, and for an independent consideration moving from A to B. The earliest trace of this jurisdiction in the specific performance of building contracts, which the industry of legal antiquaries has discovered, is found in the year book of VIII. Edw. IV. in which the court, without hesitation, decreed specific performance of a building contract. We find no record of such a case coming before the court again until 1694, when Holt vs Holt,[2] was decided. Here an agreement was entered into whereby the defendant agreed to build a house, merely a house, with no further description, and the court granted a decree enforcing the contract, making no distinction between this case and one for the performance of a contract to convey land. The next case in point of time is that of Allen v. Harding.[3] "A" covenanted with "B" to build a house upon the glebe land, and "B" brought his bill for specific performance. Defense in this case insisted that the contract was too loose and uncertain both as to time and value, for it was neither mentioned when the house was to be built, nor what sort of a house it was to be; but the lord chancellor brushed all such defense aside, and decided that such a contract would be enforced because it was to be built for the benefit of the church. This case is a fair sample of the earlier decisions before the jurisdiction of the equity courts was clearly defined. In 1747, Lord Hardwicke, in deciding City of London

[2] Vernon's Ch. 322.
[3] 1708 or 1709, 7 Anne, 2 Eq. Cases Abr., 17.

v. Nash,[4] where one contracted to rebuild houses, recognized the right of the chancery court to grant specific performance in their discretion, but denied it here because of the hardship it would work upon the defendant by reason of the plaintiff's laches.

Prior to the decision of Errington v. Aynesly,[5] in 1788, no court questioned the right of the equity court to take jurisdiction of such cases, and no test or rule is followed in their decisions. We will not attempt to reconcile such cases with the later ones, as the fundamental, well-grounded principles of equitable jurisdiction are ignored, and such decisions can hardly be considered as authority for either side of the contention. In Errington v. Aynesly, however, the court speaks for the first time of the inadequacy of a remedy at law, and lays down the familiar principle that courts of equity will not assume to enforce contracts in specie whenever the remedy at law is full, adequate and complete. This decision is followed two years later by Lord Thurlow in Lucas v. Commerford,[6] in which a contract to build a house was attempted to be enforced, but Lord Thurlow said: "The court could not undertake the building of a house, and the party must go to the legal side of the court." This decision is recognized by both judge and text-writer as the first great decision upon this subject, and it will be found cited in nearly every case subsequent to this time. It is interesting to note, however, the decision rendered in Mosely v. Virgin,[7] only six years latter, in which Lord Loughborough lays down the rule that if the contract is definite in terms, not loose and vague, "perhaps there would not be much difficulty to decree specific performance." He attempts to reconcile his views with those of Lord Thurlow, in Lucas v. Commerford, and says that Thurlow "appears to have added that he did not see how it could be made upon a covenant to build, being equally uncertain." And Lord Loughborough, reasoning from this, concludes that if it were in its nature defined and certain, it would be enforced according to Lucas v. Commerford; but in a thorough examination of the reports of this decision, we find no such statement as alluded to by Lord Loughborough. However, the case is cited as authority for the proposition that contracts, if in their nature defined, will be enforced, but after a study of each case which relies upon Mosely v. Virgin, as authority, we find that in each case the remedy at law is inadequate, and the party is forced into the equity court to obtain complete relief. Justice Miller, in a review of the authorities, in Ross v. U. P. Ry. Co., does not attempt to reconcile the two decisions, but he does speak of the attempt of Lord Loughborough to reconcile his views with those expressed by Lord Thurlow, and he says that surely Loughborough was mistaken as to the decision of Lucas v. Commerford.

After the decisions of Errington v. Aynesly, Lucas v. Commerford, and Mosely v. Virgin, we find but few courts which hold that contracts of the first division will be specifically enforced, while the great weight of authority promulgates the rule that equity has no jurisdiction over such cases, and bases it upon the ground that there is a remedy for complete relief in law. Many cases are cited in the notes as authority supporting this contention.[8]

Dicussion of Conflicting Cases. — The case of Paxton v. Newton[9] is sometimes cited as authority for enforcing building contracts specifically, but we find such case to be one for repairs and not for building. Cooper v. Jarman,[10] is often spoken of as being against the contention of this article, but a review of the facts will clear up the apparent conflict. "A" engaged "B" to build a house for him, but before the completion of it "A" died, and the house was finished after his death, and the heir-at-law, who was the plaintiff in the suit and who had been appointed administrator of the estate, paid "B" for his work out of the personal estate of the deceased "A". The question raised was, whether the plaintiff was to be allowed such payment, as he was the heir

[4] 1 Ves. Sr. 12, 3 Atkyn's Ch. Rep. 512.
[5] 2 Bro. C. C. 341.
[6] 1 Ves. Jr. 235.
[7] 3 Ves. Jr. 184.

[8] Errington v. Aynesly, 1788, 2 Dicken, 692; Lucas v. Cummerford, 1790, 1 Ves. Jr. 235; The So. Wales, etc., Ry. Co. v. Wythes, 1854, 1 Kay & Jno. 186; Whitney v. City of New Haven, 1855, 23 Conn. 624; Ross v. Union Pac. Ry. Co., 1863, 1 Walworth, 26; Fallon v. Ry. Co., 1871, 1 Dillon, 121; Middleton v. Greenwood, 1864, 2 De Gex J. & S. 142; Raphael v. Thames, etc. Ry. Co., 1866, Law R. 2 Eq. 37; The Mayor etc. v. Southgate, 1869, 17 W. R. 197; Mastin v. Halley, 1875, 61 Mo. 196; Greenhill v. Isle of Wight, 1871, 19 W. R. 345; Oregonian Ry. Co. v. Ore., etc. Co., 1885, 37 Fed. Rep. 733.
[9] 2 Smale & Gif. 1854, 437.
[10] 1866, Law R. 3 Eq. 100.

at-law. The court held that the heir-at-law was entitled to have the house finished at the expense of the personal estate of the intestate, and the question that we are now concerned with did not come directly before the court. Beck v. Allison[11] is not authority for enforcing building contracts, as there the agreement was to repair, and we do not concern ourselves with such contracts, as different questions arise and different rules are applicable. The next case which appears to conflict with the contention laid down in Lucas v. Commerford, and which is the latest case found reported that bears directly upon this division of the subject, is Jones v. Parker.[12] A bill in equity was brought by a lessee upon a lease purporting to begin on September 1, 1893, and to demise part of a basement in a building not yet erected. The lessor covenanted to deliver possession to the lessee upon completion of said building, and, thereafter, during the term of this lease, reasonably to heat and light the premises. Plaintiff alleged that the building had been completed, but that the defendant, who was lessor, refused to complete the premises with apparatus sufficient to heat and light the same, and to deliver the same to plaintiff. The prayer was for specific performance. Judge Holmes, in delivering the opinion, recognizes the doubt as to the jurisdiction of equity courts in enforcing building contracts, and cites Frye & Pomeroy on Spec. Perform., and the cases of Lucas v. Commerford, and Ross v. U. P. R. R., cited above. He speaks of the uncertainty of the agreement, etc., but concludes that specific performance should be decreed. The court cites no authority for decreeing specific performance of building contracts, and fails, as it seems to us, to apply the well grounded principles which govern the jurisdiction of the equity court. This is the only modern decision which seems to militate against the proposition that contracts of the first division will not be enforced.

Conclusion.—With this review of the authorities, we conclude that contracts to build of the ordinary class, such as fall within the first division, according to the great weight of authority, will not be enforced specifically, in equity, as the remedy of damages is adequate, and, as has been said by various courts, "B" can be hired to do what "A" won't.

Part III. *Contracts Where Owner of Land Agrees to Build Thereon in Consideration of Certain Benefits or Privileges—Distinguishing Features of This Class of Contracts.*—We now wish to consider the authorities upon cases of specific performance arising when "B" contracts to build on his own land, or land in which he has a possessory interest, with "A," who is to be benefited materially by such building, or is to receive some privilege by reason of the building, and such benefit or privilege is a part of the consideration for the contract. Cases involving the above state of facts are not found in the very early reports, at least not so often as those of the ordinary kind, such as have been treated under our first division of the subject. But since 1740, when the first case involving these facts came before the courts, the question has been raised a great many times. We find that a majority of the modern cases of specific performance of building contracts are to be found grouped under the second rather than the first division of our classification. As we proceed to consider the authorities, and to call especial attention to some of the leading cases, we will find that the preponderance of authorities is in favor of enforcing such contracts. While we may find decisions in which specific performance is denied, we will also discover wherein the case before the court was peculiar in its nature and could be distinguished from the ordinary case, or the point of "specific performance" was not passed upon directly by the court, but was decided upon some technicality of pleading, or for other reasons. We also find cases which are in conflict with our position and cannot be reconciled, but these are few in number.

Discussion of Early Important English Cases.—The first English case before the courts was Pembroke v. Thorpe.[13] "A," owner of land, leased it to "B" for a number of years for a consideration, and part of that consideration was that "B" was to pull down some old buildings then standing on the land and build new ones. "B" entered on the premises, but failed and refused to build the houses as per contract, and this bill was brought asking the court to enforce the agreement. Other questions arose, but which had

[11] 1873, 4 Dailey N. Y. 121.
[12] 1895, 163 Mass. 564.
[13] 3 Swanton's Rep. 437.

no bearing on this point. The defendant insisted that the proper remedy was in law and not in equity, but Lord Hardwick met this by saying that the plaintiff had no remedy at law at all, as the contract was not in writing, and the part performance of the contract would not help him there, because that is a rule in the consideration only of the equity court, and as there was partial performance of this contract the court would not suffer the parties to take the benefit of the statute; but he is bound in conscience and in equity to perform the whole. Another of the leading English cases is Storer v. The Gr't. W. Ry. Co.,[14] "A," a railroad, in consideration of a transfer of land to it by "B," over which a proposed railway was to pass, covenanted to build and maintain a neat archway over a crossing over such railroad. "A" refused to comply with the terms, and specific performance was asked, and the court, through Bruce, V. C., held that the court will interfere for the purpose of directing the specific performance of a contract by defendants to do defined work on their own property in the performance of which the plaintiff, with whom they have covenanted, has an interest so material that the non-performance cannot be adequately compensated by damages at law. Two years later, in 1844, the celebrated case of Price v. Mayor, etc., of Penzance,[15] was decided. In this case, Price conveyed certain lands to the defendant city, in consideration of which the city covenanted to build a fish market upon the lands conveyed. Although the right to compel performance was not exercised in this case, as the defendants built the market before the case was finally decided, the court recognized the right, and said: "Under this contract, the corporation has taken possession of the land and converted it; and having had the benefit of the contract in specie, as far as they are concerned, I need not say that the court will go to any length which it can to compel them to perform the contract in specie." The case of Sanderson v. Cockermouth, etc. Ry., Co.,[16] is considered a leading case, and a short review may be beneficial. Plaintiff in this case conveyed land to defendant, a railway corporation, which was to build a railroad on these premises, and part of the consideration for such conveyance was an agreement on the part of the defendant to build certain defined crossings as "may be necessary." Defendant made the crossings, but not according to agreement and the court decreed performance of the contract regarding the crossings, and the crossings were to be such as were reasonably necessary. The court recognized the fact that such decrees of the court were difficult to properly enforce, but where the equity is so plain, and justice could be obtained in no other way, it could be referred to a master to ascertain what was reasonable.

Discussion of Important Amercian Authorities.—In Rindge v. Baker,[17] an agreement was entered into to build a party wall and one failing to build his part, the other built it, and sued for the cost of the building. The court, in awarding damages, said that plaintiff could have come into court and compelled the defendant to specifically perform. Another leading case is to be found in Gregory v. Ingwersen.[18] Here the plaintiff transferred the title of a five foot-strip of land to defendant in consideration of his (the defendant's) building a stairway of certain dimensions, and this stairway was to be built on the strip of land conveyed. The stairway was built, but not as contracted for, and plaintiff asks for specific performance. The court, in granting the decree, speaks of the principle governing equity jurisdiction, *i. e.*, was there an adequate remedy at law? The court answered there was none, as the land was conveyed and was LOW in defendant's possession, and plaintiff's only remedy would be in equity.

Rule Sustained by Weight of Authority.—With this review of the leading cases we believe it is made plain that by the great weight of authority, both in this country and England, courts of equity will enforce contracts of the second class. These cases are recognized by both bench and bar as authority, and supported by the following authorities.[19]

[14] 1842, 3 Ry. Cases, 106.
[15] 4 Hare 506.
[16] 1849, in 11 Beavan, 497.
[17] 1874, 57 N. Y. 209.
[18] 1880, 32 N. J. Eq. 199.
[19] Birchett v. Bolling, 1817, 5 Mumford's Va. 442; Warring v. Manchester Ry. Co., 1849, 7 Hare, 482; Sir Edward Bulyer Lytton v. Great Nor. Ry. Co., 1856, 2 K. & J. 394; Aikin v. Albany R. R. Co., 1857, 26 Barb. 289; Wells v. Maxwell, 1863, 32 Beavan, 408; Cubit v. Smith, 1864, 10 Jurist (N. S.), 1123; Hood v. North E. Ry. Co., 1869, Law R. 8 Eq. 666; Wilson v. Furness, R. R. Co., 1869, L. R. 9 Eq. 28; Randall v. Latham, 1869, 36 Conn. 48; Greene v. W. Cheshire R. R. Co., 1871, 25

Decision of Conflicting Cases. — In considering the cases which are sometimes cited as authority against our contention, we find but two cases in the books which can be said to conflict with the weight of authority. Other cases which have been cited by lawyers, and sometimes by courts, as being in conflict, can very easily be reconciled, and we think should not be considered as against our proposition, but rather as authority for it. A case which is often cited is that of Brace v. Wehnert.[20] If we will but examine this case, we will find that specific performance would have been granted had the contract in terms been certain and definite, and not loose and vague. The court here refused because there were no plans or specifications by which the court could arrive at the intention of the parties. The court said: "I think the jurisdiction of this court, in cases of specific performance, should not be diminished, and I concur in the cases which lay down that if the the thing contracted to be done can be made reasonably clear, the court is bound to decree a specific performance." In the cases cited in the note, specific performance was denied for the same reason.[21] Another case, which is considered as contrary to the general rule, is the Cincinnati, etc. Ry. v. Washburn,[22] but appears from the original report to have turned on a technical point of pleading. In Haisten v. The Savannah G., etc. Ry. Co.,[23] the court refused specific performance, but on the ground that to enforce the contract would work a violation of the statute of frauds. The court said: "A court of equity interferes to decree the specific performance of a parol contract, void by the statute of frauds, only and solely because the parties have so far acted upon and by virtue of the contract as that it would be a fraud to permit the defendant to repudiate it." There was no part performance in this case, and the party must go to the law court. In Firth v. Midland Ry. Co.,[24] the court refused specific performance on the ground there had been a substituted agreement, and such agreement was to be approved by one who died before making the approval. The court held there was no definite contract to enforce.

The two cases cited in the note are in direct opposition to our contention, and, we think, against the overwhelming weight of authority.[25] In Kay v. Johnston,[26] the contract was in the shape of a lease of lands, with covenant by lessee to build a house and fence. Lessee failed to perform his covenant, and the lessors ask for specific performance, and cites in support of his claim the well known cases of "City of London v. Nash," and "Penbroke v. Thorpe," both of which are reported above, and have been considered as authorities for specific performance. Court held that the two cases cited were opposed to specific performance, and as it was entirely within the discretion of the court, he would direct an inquiry for damages only. In Kendall v. Frey,[27] plaintiff conveyed land to defendant, part of the consideration being that defendant should build a city hall of certain size and dimensions upon this land. Plaintiff owned land contiguous to the land conveyed, and when he conveyed he had in mind the benefit which he would derive from the new city hall being built there. In a suit for specific performance, the court questions the right of a court of equity to grant specific performance of building contracts, and says the more recent authorities are against it. The court cites Oregonian R. R. Co. v. Oregon, etc. Co., as authority against the proposition. The case cited is different in some respects. The "Oregon" case was one of ordinary contract to build, falling within our first division, where the remedy by damages was adequate. This case cannot be reconciled with the many authorities supporting the proposition that specific performance will be granted.

Rule as to the Enforcement of Contracts Involving Continuing Duties.—Some few courts have attempted to restrict the exercise of this

Law. T. N. S. 409; Jones v. Seligman, 1880, 81 N. Y. 190; Willard v. Ford, 1884, 16 Neb. 543; Post v. W., etc. R. R. Co., 1890, 123 N. Y. 580; L. & N. R. R. Co. v. M. & T. R. R. Co., 1893, 92 Tenn. 681, 22 S. W. Rep. 920; Prospect Park R. R. Co. v. Coney Is. R. R. Co., 1894, 144 N. Y. 152, 39 N. E. Rep. 17; S. & N., etc., Ry. Co. v. H., etc. Ry. Co., 1893, 98 Ala. 400.

[20] 1858, 25 Beavan, 358.

[21] Wilson v. North Hampton, etc. R. R. Co., 1871, L. R. 9 Ch. App. 279; Stanton v. Singleton, 1899, 126 Cal. 647.

[22] 1865, 25 Ind. 259.

[23] 1875, 51 Ga. 199.

[24] 1875, L. R. 20 Eq. 100.

[25] Kay v. Johnston (1864), 2 H. & M. 118; Kendall v. Frey, (1889) 74 Wis. 26.

[26] 1864, 2 Hemming and Miller, 118.

[27] 1869, 74 Wis. 26.

remedy to contracts which can be performed by one act, that is, by one decree of the court, and not to extend it to contracts which call for continuous acts which would require the courts to superintend. But the weight of authority is clearly against this contention, and especially is this so of the later cases. The case of Joy v. St. Louis,[28] is an important leading case, in which the court compelled a railway company to permit another company to use their tracks as per agreement. The defense insisted that the court had no jurisdiction, but such defense was not sustained. The authorities cited in the note are of the same opinion.[29]

Conclusion.—With this review, we conclude that contracts of the class or division which we have been studying are not to be considered with the class of ordinary agreements to perform certain labor or work. The latter class is not, in the proper sense of the word, one for specific performance, as the court will not decree this remedy where the remedy at law is sufficient, and in the ordinary contract for building the remedy at law for a breach is adequate, as the complaining party may at once hire other workmen to complete the building. But wherever the defendant is in possession of land and has entered into an agreement to build on that land, consideration has been given, plans for the building are definite and certain, and if for any other reasons the remedy of damages is inadequate, the courts of equity may grant relief in their discretion by decreeing specific performance.

A. S. THOMPSON.

[28] 1890, 138 U. S. 1.

[29] Lawrence v. Saratoga L. R. R. Co., 1885, 36 Hun (N. Y.), 467; Chicago R. I. & Pac. R. R. Co. v. Un. Pac. R. R. Co., 1891, 47 Fed. Rep. 15; Un. Pac. R. R. Co. v. Chi. R. I. & P. R. R. Co., 1892, 51 Fed. Rep. 309; L. & N. R. R. Co. v. M. & F. R. R. Co., 1893, 92 Tenn. 681, 22 S. W. Rep. 920; Standard Fashion Co. v. Siegel, Cooper & Co., 1898, 157 N. Y. 60.

HUSBAND AND WIFE—LIABILITY FOR WIFE'S TORTS.

HENLEY v. WILSON.

Supreme Court of California, September 13, 1902.

1. The husband's liability for tort of his wife, not done by means of, or in the use of, or in the assertion of some right in reference to, her separate property, is not changed by the fact that under the statutes she may have a separate estate, and may manage it.

TEMPLE, J.: Action for damages caused by a violent assault committed upon the plaintiff by the defendant, Delphine Wilson, wife of the appellant, J. A. Wilson. It was admitted on the trial that the husband was not present at the time of the assault, and had no knowledge of the occurrence until some time afterwards. An instruction was asked by appellant to the effect "that the husband is not responsible for the wrongful acts of the wife committed out of his presence, and without his knowledge or consent." This was refused, and a verdict for plaintiff was returned, and judgment went against both defendants, from which the husband appeals. Whether this proposed instruction should have been given is the only question involved.

While there is a conflict in the authorities, appellant concedes at the outset that a majority of the cases still hold to the common-law rule which makes the husband liable absolutely for all torts committed by the wife. This statement is too broad. Pom. Rem. & Rem. Rights, §§ 320, 321, states that as to all torts committed by the wife, not done by means of, or in the use of, or in the assertion of some right in reference to, her separate property, the common-law rules remain unchanged. Since she is permitted to manage her separate estate as though she was a *feme sole*, it follows that in such management she must be responsible as a *feme sole*. The common-law rule must prevail unless it has been changed by statute. No express change has been made, but it is contended that, since the wife now retains as her own such property as she has at the time of the marriage, and such as she afterwards may acquire by gift, descent, or devise, and may manage her own separate estate, she should now be held solely responsible for her torts, on the principle that the reason for the common-law rule has ceased to exist, and therefore the rule should cease. But what all the reasons for the rule were originally is not now so easy to determine, and accordingly it was said by Mr. Justice Field, in Van Maren v. Johnson, 15 Cal. 312: "It matters not what was the origin of the common-law doctrine; its rule is settled and exists independently of the grounds on which it originally rested." These rules are quite ancient, and cannot be said to have been rested solely upon the fact that the husband may take all the wife's personal property and her earnings, and may control her person, or that she can have no estate from which a judgment against her could be satisfied, added to the supposed merger of her legal personality in his. It was said by the Supreme Court of Texas in Zeliff v. Jennings, 61 Texas, 458, that the doctrine "rests perhaps mainly upon the supposition that her acts are the result of the superior will and influence of the husband. Owing to the intimate relation of husband and wife, and to the nature of the control given him by law and social usage over her conduct and actions, it would be difficult, if not impossible, for the courts to determine when she had acted at her own instance, and when she was guided by his dictation." And it may be added, in a case where the wife has no separate estate, if

the husband cannot be held, the aggrieved person will have no redress, and upon the wife there will be no restraint of pecuniary responsibility. If so disposed, she could with impunity blast the lives of her neighbors by most grievous slanders. Nor is it true, in the absolute sense, that she has no interest in the estate of her husband. She is entitled to a support out of it, and to be maintained in a degree of comfort proportionate to his wealth. To make this fortune liable for her torts may directly affect her. It may diminish her comfort and style of living. As to the community property, if the coverture is ended in any mode during her life without her fault, one-half of it will be hers. Most wives consider themselves equally interested in accumulations, and properly so. At common law, even, they had morally an interest in the fortune made or inherited by the husband. In some circumstances they could secure a separate maintenance from it on a scale proportionate to its amount. We hear much of the power over the wife given to the husband by the common law, which is now thought to have been oppressive. But it had its other side. It was calculated to make a more complete and indissoluble union, in which the wife had rights that could be lost only by her violation of her marriage vow, and, I think, to make the common earnings liable for the torts of each tended in the same direction. Each became the other's "keeper." These earnings are held by the husband, but are liable for the support of the wife. Since the reasons of the common-law rule cannot now be fully known, we are at liberty to suppose that it was founded upon these and many other considerations, as well as upon those usually stated.

But many of the reasons upon which it is commonly supposed the common-law rule depended still subsist, and the express limitations upon the liability of the husband or of the community property for the debts of the wife imply that in other respects the common law still prevails. For instance, the husband is the head of the family, and may choose the residence. Civ. Code, § 156. He is entitled to the custody and control and to the earnings of minor children as against the wife (Id. § 197), unless during separation (Id. § 198). The provisions of the Code giving the wife the power to make contracts with reference to property negative the idea that she has in other respects the power or the responsibility of a *feme sole*. So section 167 of the Civil Code expressly provides that the community property shall not be liable for the debts of the wife contracted before marriage, leaving it still liable for her debts contracted after marriage. See *In re* Burdick's Estate, 112 Cal. 398, 44 Pac. Rep. 734, opinion of Mr. Justice Harrison; also Van Maren v. Johnson, 15 Cal. 308; Vlautin v. Bumpus, 35 Cal. 214. Van Maren v. Johnson was a suit against husband and wife for services rendered the wife before marriage. Judgment was against both, but in terms it provided that it could be satisfied from her separate property or from the community property. The husband appealed, and the only question was as to the liability of the community property. Upon this question Judge Field said: The statute in terms provides that the separate property of the wife shall be liable for her debts contracted previous to the marriage, and at the same time that the separate property of the husband shall not be thus liable. It is silent as to liability of the common property as to such debts, and also as to the liability of that property for the previous debts of the husband." The learned judge then proceeds to show that the common law is the basis of our jurisprudence, and that the statute has modified that law, on this matter, only in two respects: "It renders the separate property of the wife liable and exempts the separate property of the husband. Beyond this exemption of his separate property his liability exists; that is to say, he is liable to the extent of the common property." That is, the common law prevails except as it has been modified by statute. Furthermore, by the express provision of the statute, the wife cannot be sued without her husband for a tort which does not concern her separate estate. She can sue or be sued alone only when: (1) The action concerns her separate property or her claim to the homestead; (2) when the action is between herself and husband; (3) when she is living in separation by his desertion, or under an agreement in writing. Code Civ. Proc., § 370. And it has been held that in an action for damages which accrue for the injury of the wife the husband must be joined; the recovery will be community property. McFadden v. Railroad Co., 87 Cal. 464, 25 Pac. Rep. 681, 11 L. R. A. 252; Neale v. Railroad Co., 94 Cal. 425, 29 Pac. Rep. 954. See, also, Sheldon v. The Uncle Sam, 18 Cal. 527, 79 Am. Dec. 103. I think there would be no profit in discussing the cases cited by appellant from other states. In some the statutes expressly provide against the liability of the husband for the torts of the wife. In others all the earnings of the wife during coverture, and all recoveries for personal injuries, are her separate property. In some cases the tort accrues in the management of her separate estate. But whatever the rule may be in other jurisdictions, the principles which are determinative of the case have been settled here, and are in accordance with the rule prevailing in a majority of the states. Some of the cases cited by the respondent are interesting, because they discuss the reason upon which the common-law rule was believed to be based. See Kowing v. Manly, 49 N. Y. 201, 10 Am. Rep. 346; Alexander v. Morgan, 31 Ohio St. 548; Heckle v. Lurvey, 101 Mass. 344, 3 Am. Rep. 366.

The judgment is affirmed.

NOTE.—*Liability of Husband for Wife's Torts at Common Law and Under Statute.*—It was well settled at common law that the husband, was liable for the torts of his wife. While this proposition is agreed upon by all the modern decisions, yet there seems to be a diversity of opinion as to the causes for the rule,

and from this fact has resulted a different line of decisions as to the effect the modern statutes, giving the wife the right to sue and be sued and the use of her separate property, should have upon the common-law rule. The principal case adopts the rule that the husband's liability did not rest alone on the fact that he was entitled to the possession and control of the wife's property, but also upon other marital duties and relations. And, consequently, using that for a basis, upon which to found its argument, very justly arrives at the conclusions announced in the case; and therefore all decisions founded upon a like basis would support the rule, that although the statute gave to the wife the right to sue and be sued, and to have full control of her property, yet unless the statute further provided, that the husband should not be liable for the torts of his wife, the liability of the husband would still exist as at common law. In the state of Illinois in which the basis of the common law was given to be the fact that the husband had the right to use and control the wife's property, it was held that for that reason he was liable for her torts and that if these property rights were removed, that therefore, without any further statutory provision, the husband could not be held liable for the wife's torts. Martin v. Robson, 65 Ill. 129. To the same effect are the holdings of the Kansas Supreme Court. Norris v. Corkhill, 32 Kansas, 409. However, as a general rule, I think it may be said, that the courts are inclined to follow the rule in the principal case and hold that unless the statute expressly states that the husband shall not be liable for his wife's torts that the mere giving to the wife the right to use and control her own property will not relieve the husband of his common-law liability. See MacElfresh v. Kirkendal, 36 Iowa, 224; Hill v. Duncan, 110 Mass. 238; Fitzgerald v. Quann, 109 N. Y. 441. Thus, in Ohio, under a former statute of that state, it was held, that the husband was not relieved from his common-law liability for torts committed by his wife during coverture, and there was nothing in the act which evinced in any degree that it was intended to change or abrogate the common-law rules; and that such matter could not be inferenced by implication. Fowler v. Chicester, 26 Ohio St. 9. This state has by recent statute, expressly provided, that the husband should not be liable for the torts of his wife. Under the English married woman's act, which provided "that a married woman shall be capable of suing and being sued, either in contract or in tort or otherwise, in all respects as if she were the *feme sole*, and her husband need not be joined with her as plaintiff or defendant or made a party in action or other legal proceeding," etc., it was held that the husband might be joined with his wife in a suit for her tort. Seroka v. Kattenburg, L. R. 17 Q. B. Div. 177, 55 L. J. B. 375, 34 Week. Reps. 542, 54 L. T. N. S. 649. These cases, however, are applied to torts which do not arise out of the use of a wife's separate property, such as slander, assault and battery, etc. Where they arise from some use or misuse of the wife's separate property, then the husband is not liable. This is well illustrated in the case of Quilty v. Battie, 135 N. Y. 201, where an action was brought for damages, resulting from an injury caused by a vicious dog which was harbored on the wife's property. It was held that the husband was not liable by reason of his marital relations, although he owned the dog. It was not sought to make him liable for the reason, that he was the owner of the animal, but by reason of his marital relations.

A great many of the statutes of the various states have a provision that the husband is relieved from the liability for his wife's torts, unless they were committed by the authority, direction or encouragement of the husband. Austin v. Cox, 118 Mass. 58; McCarty v. DeBest, 120 Mass. 89; Burt v. McBain, 29 Mich. 260; Ricci v. Mueller, 41 Mich. 214; Weber v. Weber, 47 Mich. 569: Mason v. Mason, 66 Hun (N. Y.), 386; Vocht v. Kuklence, 119 Pa. St. 365; Storey v. Downey, 62 Vt. 243. See, also, Hill v. Duncan 110 Mass. 238; Arthurs v. Chatfield, 9 Pa. Co. Ct. 34; Quick v. Miller, 103 Pa. St. 67; Lee v. Kopkins, 20 Ont. 666. In a recent case in Louisiana in an opinion, in which it is not shown whether there is a statute on the subject or not, the husband was held not to be liable for a slanderous utterance of his wife, when it was not shown that he was cognizant of the utterance. McClure v. Martin, 104 La. 496, 29 So. Rep. 227. In a recent case in Vermont (Russell v. Phelps, 50 Atl. Rep. 1101, 73 Vt. 390), it was held that under the statute providing that a married man shall not be liable for the torts of his wife unless committed by his authority or direction, that a married man is not liable for a tortious act of his wife committed by his direction when the substantive basis of such tort is the direct tort of the wife regarding her separate estate, since the statute merely leaves the torts of the wife committed by direction of the husband as they were by common law. In the same state in an earlier case, Story v. Downey, 62 Vt. 243, 20 Atl. Rep. 321, under a statute which provided that a husband shall not be liable for the torts of his wife unless committed by his authority or direction, that it was improper to join the husband as defendant, unless it was alleged that the slander was uttered under the direction or authority of the husband. In Nebraska, where it was sought to charge the husband with a letter written by a defendant's wife containing a libelous charge it was held, that, in order to render the husband liable, it must be shown that he assisted in or authorized the composition of the libelous letter. Mills v. State, 18 Neb. 575. So it was held in New York that a husband was not liable for the act of the wife in causing a dog to bite a child when there is no evidence that the act was done under his coercion or instigation. Strubing v. Mahar, 61 N. Y. Supp. 799.

The following cases are suggestive where the act was done in the husband's presence or by his coercion: Kosminsky v. Goldberg, 44 Ark. 401; Storey v. Downey, 62 Vt. 243; O'Connor v. Welsh, 29 W. N. C. 92; Quick v. Miller, 103 Pa. 67, Gantt's Ark. Dig. 1233; Mills v. State, 18 Neb. 575; McNicholl v. Kane, 2 City Ct. Rep. 57. A wife, however, is not exempt from liability for her tortious acts by reason of the mere presence of her husband. It must be shown that her acts were committed by his coercion. O'Brien v. Walsh, 43 Atl. Rep. 664. See, also, in this connection: 23 Cent. L. J. 364, 42 Cent. L. J. 151, 35 Cent. L. J. 483.

WM. ROCKEL.

Springfield, Ohio.

JETSAM AND FLOTSAM.

THE ADOPTION OF THE REFERENDUM IN OREGON.

The first state in the Union to have an out-and-out popular referendum is Oregon. That state has now adopted an amendment to the state constitution which establishes completely the direct power of the people over legislation. It is provided that whenever eight per cent. of the legal voters petition for any specific legislation, this must be sub-

mitted to popular judgment at the polls, and if a majority approve of it, it is made law without the intervention of the legislature. Also, if five per cent. of the voters demand the popular judgment on any bill which the legislature passes, it must be submitted to the people, who may ratify or reject it. It is further provided that the governor shall not have the power to veto a bill which the people have adopted by direct ballot. There ought to be no objection on the part of sister states to watching the progress of this referendum principle in Oregon, to see how it eventuates. For our own part, we fail to discern how it can be made, in all cases, to establish the public weal (though it may in some cases), because it is quite within the bounds of probability that certain measures which are wholly for the public good shall be repudiated by a majority vote at the polls, notwithstanding all the more thoughtful elements of society might discern that the law is good and needful. It is conceded that it may put a veto upon certain measures of the legislature that ought not to become laws and thus break up legislation inimical to public interests, but, at the same time, puts it into the hand of a small body of men to set in operation expensive machinery, and then to call in as judges those who are not qualified by education along legislative lines to pronounce upon it, besides opening the door to corruption. Probably it will be said that it is less difficult to corrupt a large body of voters than a small body of legislators, and this may be true. At all events, the referendum scheme, which seems to have proven a reasonable success in Switzerland, and which has many intelligent advocates in this country, will now have a trial in Oregon, and the result of that trial will be watched for with unusual interest.—*New Jersey Law Journal.*

AMENDMENT OF THE FEDERAL CONSTITUTION.

A hearing was recently had before the judiciary committee of the House of Representatives upon the proposition to amend the constitution of the United States so as to provide that the term of office of the president shall commence on the last Thursday in April, instead of the 4th day of March. If the proposition comprehends merely a change of inauguration day, we are not surprised at the report that the sentiment in the House of Representatives in its favor is decidedly lukewarm. Undoubtedly such a change would be desirable, but there are more important proposed amendments which may well engage earlier attention. A proposed amendment has been favorably passed on by the Senate, changing not only the date of the inauguration of the president and vice-president, but of the commencement and termination of Congress, from the 4th day of March to the last Thursday in April. The anomaly of the present law, by which members of a house of representatives elected in November do not take their seats until a year from the following December is generally conceded. It would increase such anomaly to extend for two months the term of a congress whose majority possibly had been discredited at the polls. In an article in *The Forum* for April, 1902, Mr. H. L. West, discussing "Proposed Amendments to the Constitution," said: "I am inclined to agree with the opinion that it would be better to have the new congress assemble, and the president sworn in on the 1st day of January. This would bring the members of the house to their duties almost immediately after their election. They would be fresh from the people and in a position to enact into legislation the issues upon which the campaign had been fought." This suggestion is certainly entitled to careful consideration.

Another amendment which has been favorably reported by the Senate is as follows:

"In all cases not provided for by article 2, clause 5 of the constitution, where there is no person entitled to discharge the duties of the office of the president, the same shall devolve upon the vice-president. The congress may by law provide for the case where there is no person entitled to hold the office of president or vice-president, declaring what officer shall then act as president, and such officer shall act accordingly until the disability shall be removed or a president shall be elected."

This certainly covers a matter of great importance, as the constitution in its present form "absolutely fails to provide for an emergency where there is no person entitled to hold the office of president or vice-president, although it might arise through the death or disability of the newly elected officials between the election day in November and inauguration day in March."

Some readers may be surprised to learn that the legislatures of seven states have applied for the calling of a constitutional convention for the purpose of proposing amendments. In certain other legislatures resolutions of similar import have been introduced. This movement is primarily inspired with a view to altering the present law so that United States Senators may be elected by direct vote of the people instead of by the various legislatures. As to the wisdom of such change opinions differ, and we do not propose to express an opinion on it at the present time. It certainly seems to have taken more serious hold upon popular sentiment than any other amendment which has been proposed during recent years. As to the scheme of calling a convention we entirely concur in the following language from Mr. West's article:

"It would seem as if a constitutional convention, for whatever purpose called, would be unwise. It would be a most disturbing element in the national serenity. It is true that the legislatures which have already acted have specified only one desirable change; but all authorities agree that if the convention assembled it would not and could not be restricted to this single consideration. Every proposition, no matter how radical, which might be conceived in the fertile minds of would-be statesmen, would be offered for discussion. The convention would, in all probability, be in session for a year, during which time the business interests of the country would pass through a period of uncertainty that would be almost disastrous. Besides this, the spectacle of such a revered document lying helpless in the hands of those who would possess the power to mar its beautiful symmetry, to alter its familiar and oft-construed sentences, to introduce new and possibly dangerous phrases, would be a shock to the moral sense of the nation. After all, the American people are conservative. Their Anglo-Saxon blood teaches them to revere tradition and precedent. The document which has been almost untouched during the nation's evolution has become sacred. Those who believe, with the late Mr. Gladstone, that our constitution is the greatest instrument ever struck off by the hand of man could hardly view with equanimity any effort to alter materially its stately form."

We hope, however, that the increasing discussion upon all the proposed amendments will tend to familiarize the people with the idea of amendment and gradually develop the policy of occasional special amendment, through the alternative method of proposal by two-thirds of the members of both houses of congress, and ratification

by the legislatures, or conventions, of three-fourths of the states. From 1804 to 1865 the constitution was not changed in any respect. The thirteenth, fourteenth and fifteenth amendments were passed and ratified under a stress of popular sentiment engendered by the War of the Rebellion. Since that time the public have been so apethetic that it has come to be practically assumed that the constitution is unamendable. It is fortunate that the federal constitution contains comparatively few provisions that properly should have been left to ordinary legislation. Nevertheless, a preponderance of popular sentiment, if it could be sufficiently aroused, would favor some changes in matters of essential governmental policy as prescribed in the original instrument. An example may be afforded by the proposed change in the method of electing United States Senators, and probably less disputable illustrations are the proposition to authorize the president to veto any item in an appropriation bill, without vetoing the entire bill, and that for a uniform marriage and divorce law. It is greatly to be desired that one or two of these measures, which are of serious importance in themselves, and would command a large popular support, be taken up and systematically agitated. The present practical attitude toward amending the constitution is altogether too much a compound of fetichism and indolence. Conceding all the credit to the Fathers, which they deserve for framing "the greatest instrument ever struck off by the hand of man," in the very nature of things, it must be true that no law of the comprehensiveness of the constitution could have been framed so as to be adequate for all time. Moreover, observation demonstrates that in several respects the constitution has been outgrown and become inadequate. For reasons stated above, we believe that the method of special amendment upon the initiative of Congress is preferable to that by constitutional convention.—*New York Law Journal.*

BOOK REVIEWS.

GOODRICH'S BENCH AND BAR.

An instructive and entertaining address on the subject of the Bench and Bar as Makers of the American Republic was delivered by Hon. W. W. Goodrich, presiding justice of the New York Supreme Court, Appellate Division, on Forefather's Day, 1902, a day set apart for the celebration of the 280th anniversary of the Pilgrim Fathers. This address has just been published and offered to the profession. Judge Goodrich divides American history into four parts—the Colonial period ending with the close of the revolution, the Constitutional period ending with the adoption of the federal constitution, the Formative period ending with the Civil War, and the National period now in progress. As to the early part of the Colonial period Judge Goodrich admits that the Pilgrim Fathers barely tolerated lawyers, regarding them as a necessary evil to be carefully circumscribed. Later in this period, however, when life became more complex and complications with England was threatening the safety and prosperity of the colonies, the despised lawyer was thrust into a position of influence far exceeding that ever held by him in England. During those days of fear and hesitation just preceding the revolution it was lawyers like John Adams, Josiah Quincy, Thomas Jefferson and Patrick Henry which guarded and crystallized public sentiment, and there can be little doubt that the work of these great lawyers influenced and confirmed the colonies in their determination to free themselves from England and her injustice. During the Constitutional period from 1780 to 1789, which Judge Goodrich regards as the most important time in our history, the influence of the lawyer was in complete ascendancy and to that profession belongs the credit of framing the greatest instrument for the government of a nation ever "struck off at a given time by the brain and purpose of man." Of the fifty-five members of the fateful convention which drafted our constitution, thirty-five were lawyers. From among these came the leaders of that convention—Alexander Hamilton, James Madison, Oliver Ellsworth, Charles C. Pinckney and Edmund Randolph. During the formative period, the influence of the bench and bar was still paramount. We have but to mention the name of Marshall to evidence the preeminence of the judiciary, and the great debate between Douglass and Lincoln to illustrate that the lawyers of the country had almost everything to do with shaping the opinion of people on the momentous questions arising out of the controversy over slavery. And finally, during the latter part of this period when all questions had narrowed into one supreme issue, the integrity of the Union, our minds unite on one man, Daniel Webster, the greatest of all constitutional lawyers, who in thrilling sentences argued for the inseparability of the Union and against the right of any single state or any combinations of states to nullify the constitution or to secede from its compact. "Webster in Congress," says Judge Goodrich, "in public debates was what Chief Justice Marshall was in the supreme court, the exponent of nationality." During the National period which succeeded the Civil War, and of which we are now a part, the lawyer is still supreme in the political affairs of the nation. During this period the great questions of reconstruction and of equal rights without regard to race, color or previous conditions of servitude, were settled and solved by lawyers and firmly established by amendments to the constitution. Indeed, through this period as through every other period of our history the people have seemed to think that it was not possible to conduct public affairs without the assistance of lawyers. Judge Goodrich closes his address with not too fulsome panegyric upon the profession that has swayed the destinies of the greatest nation on the globe from its very infancy. The booklet containing this address is printed in sixty-six pages and bound in leatherette. Published by E. B. Treat & Co., New York.

BOOKS RECEIVED.

A Treatise on the Power of Taxation, State and Federal, in the United States. By Frederick N. Judson, of the St. Louis Bar. St. Louis: The F. H. Thomas Law Book Company, 1903. Sheep, pp. 868, price, $6.30. Review will follow.

Canadian Railway Cases, Containing a Selection of Cases Affecting Railways, Recently Decided by the Judicial Committee of the Privy Council, the Supreme Court and the Exchequer Court of Canada, and the Courts of the Provinces of Canada, with Notes and Comments, by Angus MacMurchy and Shirley Denison, of Osgoode Hall, Toronto, Barristers-at-Law. Volume 1. Toronto: Canada Law Book Company, 32 Toronto Street, 1902.

HUMORS OF THE LAW.

Mr Justice Darling dealt the other day with a counsel whose forensic style was wanting in conciseness. The learned gentleman, having commenced his cross-examination of the witness by asking him "how many children he had," concluded it by repeating the question. "When you commenced your examination," said the judge, "the witness had three."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACTION—Demand —Demand is not necessary before filing set-off for money which is held wrongfully; it being clear that demand would be unavaling. — Whitcomb v. Stringer, Ind., 64 N. E. Rep. 636.

2. ADVERSE POSSESSION — Constructive Occupation.—The rule that actual adverse occupation of part of a tract of land under a recorded deed is constructive adverse occupation of the whole tract covered by the deed does not apply to a record owner, none of whose land is thus occupied. — Walsh v. Wheelwright, Me., 52 Atl. Rep. 649.

3. ADVERSE POSSESSION — Privity of Possession.—Where a person went into possession under a contract to purchase, and delivered possession to defendant, who claims adversely to the owner, the time such person was so in possession cannot be included in the 10-year limitations. — Thompson v. Dutton, Tex., 69. S. W. Rep. 641.

4. ALIENS — Chinese Exclusion. — The mere assertion of citizenship cannot deprive a United States commissioner of his jurisdiction to adjudge a Chinese person to be unlawfully within the United States. — Chin Bak Kan v. United States, U. S. S. C., 22 Sup. Ct. Rep. 891.

5. APPEAL AND ERROR—Affirmance.—Where, on appeal to the court of appeals, there is an affirmance, appellant may not sue out a writ of error from the supreme court to the judgment of the district court.—Platte Land Co. v. Hubbard, Colo., 69 Pac. Rep. 514.

6. APPEAL AND ERROR—Dismissal.—Where the parties to an appeal settle the controversy, the appeal will be dismissed by the supreme court, though the cause has been argued and submitted. — Wedekind v. Bell, Nev., 69 Pac. Rep. 612.

7. APPEAL AND ERROR — Nunc Pro Tunc Entry. — The clerk of the supreme court has no authority to make a *nunc pro tunc* entry of the filing of a petition for a rehearing, but it must be filed on the date on which it is received by him. — Radloff v. Haase, Ill., 64 N. E. Rep. 557.

8. APPEAL AND ERROR—Operation of Statute.—Statute declaring no appeal shall hereafter be taken from certain cases held to apply to a case in which judgment was rendered, but appeal was not perfected, before approval of act.—Fitch v. Long, Ind., 64 N. E. Rep. 622.

9. APPEAL AND ERROR — Waiver of Objection.—An objection to an instruction not raised at the original hearhearing of a cause will not be considered on rehearing. —Union Pac. R. Co. v. Colorado Postal Tel. Cable Co., Colo., 69 Pac. Rep. 564.

10. ATTACHMENT — Fraudulent Conveyance. — Subsequent attachments of real estate fraudulently conveyed by an assignor by deed good against him are superior in law and in equity to the title of assignees under a general assignment.—Watson v. Bonfils, U. S. C. C. of App., Eighth Circuit, 116 Fed. Rep. 157.

11. ATTACHMENT— Nonresident. — Where summons on a nonresident is served by publication, and a personal judgment thereafter rendered, the judgment is valid as against property attached, but no further. — Kerns v. McAulay, Idaho, 69 Pac. Rep. 539.

12. ATTORNEY AND CLIENT—Assignment of Alimony.—A contract by a wife to assign part of alimony to attorney is void as against public policy.—Lynde v. Lynde, N. J., 52 Atl. Rep. 694.

13. ATTORNEY AND CLIENT—Fraudulent Conveyance.—An attorney has no authority as such to buy for his client the latter's property at execution sale in proceedings in which the attorney is employed.—Fisher v. McInerney, Cal., 69 Pac. Rep. 622.

14. ATTORNEY AND CLIENT—Knowledge of Attorney.—Client held not charged in making purchase with knowledge of his attorney, who without his knowledge was representing vendors, and was personally interested in making the sale.—Scotch Lumber Co. v. Sage, Ala., 32 So. Rep. 607.

15. BANKRUPTCY—Allowance of Exemptions.—A court of bankruptcy cannot reopen the matter of a bankrupt's exemptions, after they have been set off to him and he has been granted a discharge, the validity of which is not questioned. — *In re* Reese, U. S. D. C., N. D. Ala., 115 Fed. Rep. 993.

16. BANKRUPTCY — Amendment of Proof.—An amendment to a proof of claim cannot be allowed which will permit the claim to be proved after the expiration of the year to which such proof is limited by bankrupt act.—*In re* Moebine, U. S. D. C., E. D. Pa., 116 Fed. Rep. 47.

17. BANKRUPTCY — Appointment of Receiver.—A court of bankruptcy is without jurisdiction to appoint a receiver to take possession of property which is held by a third person, who claims it as owner, or to make a summary order for the sale of such property without the consent of the adverse claimant. — Beach v. Macon Grocery Co., U. S. C. C. of App., Fifth Circuit, 116 Fed. Rep. 143.

18. BANKRUPTCY—Change of Homestead. — Under the exemption laws of Kansas, an insolvent debtor may lawfully change his homestead within four months prior to his bankruptcy, by abandoning one and removing to another property more valuable, where it is done in good faith and without fraud. — Hunergardt v. John S. Brittain Dry Goods Co., U. S. C. C. of App., Eighth Circuit, 116 Fed. Rep. 31.

19. BANKRUPTCY—Contempt. — A court of bankruptcy cannot lawfully order a bankrupt to deliver to his trustee money or property which is not in his possession or under his control, and imprison him if he fails to comply with such order, which would be in fact an imprisonment for debt, and not for contempt.— Boyd v. Glucklich, U. S. C. C. of App , Eighth Circuit, 116 Fed. Rep. 131.

20. BANKRUPTCY—Debts Entitled to Priority — Under the provision of Code Iowa making individual partners liable for taxes due from the firm, taxes levied against a firm are provable as a preferred claim against the estate of a partner in bankruptcy.—*In re* Green, U. S. D. C., 116 Fed. Rep. 110.

21. BANKRUPTCY—Discharge.— Specifications of objection to the discharge of a bankrupt on the ground that he has made a false oath, which fail to charge that the same was made knowingly and fraudulently, are fatally defective and must be disregarded.— *In re* Beebe, U. S. D. C., E. D. Pa., 116 Fed. Rep. 48.

22. BANKRUPTCY— Exemptions.— A bankrupt cannot claim his exemptions, allowed by the laws of Pennsylvania, out of money or property recovered by his trustee from a creditor, to whom the bankrupt had given a preference in fraud of the bankruptcy act. — *In re* Long, U. S. D. C., E. D. Pa., 116 Fed. Rep. 113.

23. BANKRUPTCY—Exempt Property.—A court of bankruptcy cannot subrogate a trustee to the rights of a creditor who has acquired a lien on exempt property of the bankrupt for the purpose of enforcing such lien

for the benefit of the estate.— *In re* Jackson, U. S. D. C., E. D. Pa., 116 Fed. Rep. 46.

24. BANKRUPTCY—Fraudulent Concealment. — Where the evidence of fraudulent concealment of assets is wholly circumstancial, it is unnecessary to aver in an involuntary petition in bankruptcy the precise details of the act of concealment. — *In re* Bellah, U. S. D. C., D. Del., 116 Fed. Rep. 69.

25. BANKRUPTCY—Ground for Replevin.—Where goods sold has been seized in replevin prior to the appointment of a trustee in bankruptcy, such trustee could not retain the property, if it had been obtained by the fraud of the bankrupt. — Goodyear Rubber Co. v. Schreiber, Wash., 69 Pac. Rep. 648.

26. BANKRUPTCY—Homestead.— The fact that a bankrupt removed with his family into a building owned by him, after he became insolvent and in contemplation of bankruptcy, does not defeat his right to claim his homestead exemption in the property. — *In re* Stone, U. S. D. C., E. D. Ark., 116 Fed. Rep. 35.

27. BANKRUPTCY — Landlord's Lien. — A lien on the goods and chattels of a tenant on the rented premises for rent due for the balance of the renting year, given by law of Delaware, will be enforced as against the proceeds of such goods and chattels sold by a trustee in proceedings in bankruptcy against the tenant. — *In re* Mitchell, U. S. D. C., D. Del., 116 Fed. Rep. 87.

28. BANKRUPTCY — Petition. — The sufficiency of the number of creditors to petition in bankruptcy is a jurisdictional fact, which may be questioned in proceedings in a state court. — Buckingham v. Schuylkill Plush & Silk Co., *In re* O'Donnell, 77 N. Y. Supp. 857.

29. BANKRUPTCY—Petition.—A petition in involuntary bankruptcy is defective, if it omits to aver that the defendant is not a wage-earner, nor a person engaged chiefly in farming.—*In re* Bellah, U. S. D. C., D. Del., 116 Fed. Rep. 69.

30. BANKRUPTCY—Preferences.— Payments made on a note by an insolvent within four months prior to his bankruptcy, to an indorsee, who holds the note as collateral security for a debt of the payee, are payments to the payee, and must be surrendered by him before he can prove a further indebtedness against the bankrupt's estate.—*In re* Meyer, U. S. D. C., N. D. Tex., 115 Fed. Rep. 997.

31. BANKRUPTCY—Proof of Claim. — A court of bankruptcy may, in its discretion, permit the amendment of a proof of claim after the expiration of the year allowed for proving claims, where there was sufficient to amend by in the original proof. — Hutchinson v. Otis, U. S. C. C. of App., First Circuit, 115 Fed. Rep. 937.

32. BANKRUPTCY—Right to Object to Claim — A creditor of a bankrupt, who has made no objection to claims of other creditors, which have been allowed and on which dividends have been paid, is barred by laches from the right to require the trustee to then re-examine and disallow such claims on the ground of preferences received by the claimant. — *In re* Hamilton Furniture Co., U. S. D. C., E. D. Pa., 116 Fed. Rep. 115.

33. BILLS AND NOTES — Recovering Paid Note.— The maker of a note which has been paid may sue to recover its possession.—Carr v. Jones, Wash., 69 Pac. Rep. 646.

34. BILLS AND NOTES—Waiver.—An indorser of a note may waive in advance presentment and notice of dishonor.—Keller v. Home Life Insurance Co., Mo., 69 S. W. Rep. 612.

35. BREACH OF MARRIAGE PROMISE — Request to Perform. — Where at the time set for the marriage, defendant was sick, and before his recovery plaintiff sued for breach of his promise, which action she discontinued, she cannot recover in a second action without offer to marry him after the first action was discontinued.—Clark v. Corey, R. I., 52 Atl. Rep. 811.

36. CARRIERS — Connecting Lines. — It is the duty of a connecting carrier to deliver goods shipped under a through bill of lading to the next carrier, and to so deliver them in good condition for shipment, and its duty is not discharged by tendering them when in an unfit condition, whether it arose from an injury received while in the carrier's hands or from some unusual cause. — Buston v. Pennsylvania R. Co., U. S. C. C., E. D. Pa., 116 Fed. Rep. 235.

37. CARRIERS — Damage by Water. — A provision in a shipping receipt that no carrier is liable for damages by wet not due to its own negligence or that of its servants held binding. — Mears v. New York, N. H. & H. R. Co., Conn., 52 Atl. Rep. 610.

38. CARRIERS — Duty to Light Platform. — A railroad was negligent where an employee, who knew that the platform was insufficiently lighted and of the existence of a space between it and the lower steps of the car, directed and commanded a passenger to leave the train while under motion.—Gulf, C. & S. F. Ry. Co., v. Shelton, Tex., 69 S. W. Rep. 653.

39. COLLISION—Negligent Towing.—It is not negligent, under all circumstances, for a tug to tow a vessel with a great length of line, and to render her liable for a collision, on that ground it must be shown that it resulted from such cause. — The Captain Sam, U. S. D. C., S. D. Ala., 115 Fed. Rep. 1000.

40. CONSPIRACY — Law of the Case. — To constitute the crime of conspiracy to cheat, it is immaterial whether or not the cheat, or any one of the devices by which it was accomplished, unassociated with the conspiracy, would be indictable. — State v. Gannon, Conn., 52 Atl. Rep. 727.

41. CONSTITUTIONAL LAW — Alimony.—A money decree for alimony is not a debt, within the constitutional prohibition against imprisonment for debt, but is such an order as, under Rev. St., § 5640, authorizes punishment for contempt on a wilful failure to comply with the decree.—State v. Cook, Ohio, 64 N. E. Rep. 567.

42. CONSTITUTIONAL LAW — Constitutional Question.— The supreme court will not decide a constitutional question when it can place its decision on other grounds.— Hart v. Smith, Ind., 64 N. E. Rep. 661.

43. CONSTITUTIONAL LAW—Physicians and Surgeons.— That Acts 1895, c. 170, relating to the registration of physicians, in terms exempts from its operation a physician called in from another state, does not bring the act in conflict with the fourteenth amendment of the United States constitution. — State v. Bohemier, Me., 52 Atl. Rep. 643.

44. CONTRACTS—Joint.—Where the law implies a promise, the consideration for which moves from several persons jointly, the promise will be joint as to the promisees.—Eveleth v. Sawyer, Me., 52 Atl. Rep. 639.

45. CONTRACTS — Oral. — Where a contract of employment was partly through letters and partly oral, it will be treated as a parol contract. Stauffer v. Linenthal, Ind., 64 N. E. Rep. 643.

46. CONTRACTS — Restricting Location Railroad Stations. — A contract by which a railroad company agrees to establish and maintain a station at a particular place, and not to establish or maintain any other station within a certain distance therefrom, is contrary to public policy, and cannot be enforced in a court of equity.— Beasley v. Texas & P. Ry. Co., U. S. C. C. of App., Fifth Circuit, 115 Fed. Rep. 952.

47. COPYRIGHTS — Newspapers. — There can be no general copyright as an entirety of a daily newspaper, which is composed in large of matter not entitled to protection.—Tribune Co. of Chicago v. Associated Press, U. S. C. C., N. D. Ill., 116 Fed. Rep. 126.

48. CORPORATIONS — Collateral Attack. — Where it appears from the articles of incorporation of a corporation that it is duly organized and existing under the laws of the state, its charter cannot be attacked in a collateral proceeding. — Union Pac. R. Co. v. Colorado Postal Tel. Cable Co., Colo., 69 Pac. Rep. 564.

49. CORPORATIONS — Director's Purchase. — Director of a corporation held liable to a creditor of corporation for profits made by him on purchase of corporation's goods. Fishel v. Goddard, Colo., 69 Pac. Rep. 607.

50. CORPORATIONS—Salaries of Officers.—Where corporation directors attempt to fix their own salaries, they will be allowed only the actual value of such services.—Davis v. Thomas A. Davis Co., N. J., 52 Atl. Rep. 717.

51. CORPORATIONS — Secret Bonus to One Stockholder. —Where one stockholder in a corporation, who joined with the others in selling all the stock and property of the corporation as an entirety, secretly received an additional sum for his own benefit which in equity belonged to all the stockholders, and the interest of each therein, can be readily ascertained without an accounting, an action in *assumpsit* will lie by one of such stockholders to recover his share.—Synnott v. Cummings, U. S. C. C., D. N. J., 116 Fed. Rep. 40.

52. CORPORATIONS — Stockholder's Liability. — Unpaid stock subscriptions are liable for the corporate debts only after all legal remedies against the corporation have been exhausted, or where it is insolvent.—Fletcher v. Bank of Lonoke, Ark., 69 S. W. Rep. 580.

53. COSTS—Compulsory Nonsuit.—Where a compulsory nonsuit had been granted, it was not error to order a stay of a new action between the parties until the judgment and costs in the former case had been paid.—Schwede v. Heinrich, Wash., 69 Pac. Rep. 643.

54. CRIMINAL EVIDENCE—Admissions —A statement by a justice of the peace to accused, after her arrest, that she had better tell the truth, does not preclude her confession from being admissible against her, as not being voluntary —Grimsinger v. State, Tex., 69 S. W. Rep. 583.

55. CRIMINAL EVIDENCE — Involuntary Confession.— Where two defendants were tried jointly, evidence by third parties of a statement made by one defendant tending to inculpate both, but inadmissible as to the maker because not voluntary, is hearsay as to the other. —People v. Gonzales, Cal., 69 Pac. Rep. 487.

56. CRIMINAL LAW—Breach of the Peace.—On a prosecution for breach of the peace, in which disturbance two officers were asaaulted, it was proper to show that defendant had that morning threatened to assault one of them.—Stafe v. Tucker, Conn., 52 Atl. Rep. 741.

57. CRIMINAL LAW—Demanding of Accused Incriminating Documents.—To permit a demand to be made on the defendant in a criminal case, in the presence of the jury, to produce a paper or document containing incriminating evidence against him, is a violation of the immunity secured to him by the fifth amendment to the constitution.—McKnight v. United States, U. S. C. C. of App., Sixth Circuit, 115 Fed. Rep. 972.

58. CRIMINAL LAW—Disqualification of Judge.—Under Gen. St., § 841, the disqualification of a judge was not waived by merely proceeding to trial.—State v. Hartley, Conn., 52 Atl. Rep. 615.

59. CRIMINAL TRIAL — Instruction. — An instruction that, "if any one of the jury has a reasonable doubt of the guilt of the defendant, they are not for this reason required to acquit the defendant," was not error.—Nevill v. State, Ala., 32 So. Rep. 596.

60. CRIMINAL TRIAL—Submitting Question of Insanity. —Where the question whether a defendant in a criminal case was insane at the time of the trial is submitted to the jury for a preliminary finding, a unanimous verdict of insanity is required to authorize the court to take action thereon.—United States v. German, U. S. D. C., N. D. Ky., 115 Fed. Rep. 987.

61. CRIMINAL TRIAL — Waiver — Criminal Statute.—A district attorney cannot make a valid agreement to refrain from enforcing a criminal statute.—Giano v. People, Colo., 69 Pac. Rep. 504.

62. DAMAGES — Blasting. — In an action for damages caused by blasting in an adjoining quarry, plaintiff cannot recover for probable future damages.—Wilkins v. Monson Consol. Slate Co., Me., 52 Atl. Rep. 755.

63. DEEDS—Construction.—The word "beach," may be construed, in the light of the circumstances surrounding the execution of such deed, to mean a sandy shore above high-water mark.—Wakeman v. Glover, Conn., 52 Atl. Rep. 622.

64. DIVORCE—Alimony.—Alimony to be allowed in the future is not susceptible of assignment by the wife to another, nor capable of being enjoyed by her in anticipation.—Lynde v. Lynde, N. J., 52 Atl. Rep. 694.

65. DIVORCE—Alimony.—A decree of divorce awarding alimony held subject to modification to provide for the support by the husband of a minor child.—Tobin v. Tobin, Ind., 64 N. E. Rep. 624.

66. DIVORCE—Mormon Church.—The Mormon "church divorce" is invalid, though the parties believe it valid and attempt to contract another marriage.—Gordon v. Roylance, Utah, 69 Pac. Rep. 660.

67 EJECTMENT—Actual Knowledge.—Possession of the means of knowledge of adverse title by defendant in ejectment, in an action to recover for improvements, justifies a finding of actual knowledge. — Kugel v. Knuckles, Mo., 69 S. W. Rep. 595.

68. EJECTMENT—Encroachment on Highway. — Ejectment by the municipal authority is the appropriate remedy against a person unlawfully encroaching upon a public highway under its control.—Asbury Park v. Hawxhurst, N. J., 52 Atl. Rep. 694.

69. EMINENT DOMAIN—Condemnation. — Where land which is not needed for railroad purposes has been appropriated for a right of way, such appropriation will not prevent the condemnation of such land for another public use.—Denver Power & Irrigation Co. v. Denver R. G. R. Co., Colo., 69 Pac. Rep. 568.

70. EMINENT DOMAIN—Street Railroads.—A street railroad company has no right to construct its line across railroad tracks in a city street without first compensating the railroad company for damages resulting therefrom.—Central Pass. Ry. Co. v. Philadelphia, W. & B. R. Co. Md., 52 Atl. Rep. 752.

71. EMINENT DOMAIN — Telegraph Company.—A telegraph company cannot be prevented from condemning a way along a railroad right of way merely because there is a highway adjacent, along which its lines could be built, as allowed by Mills' Ann St., § 587. — Union Pac. R. Co. v. Colorado Postal Tel. Cable Co., Colo., 69 Pac. Rep. 564.

72. ESTOPPEL — Innocent Sufferers.—Where the mortgagors, by delivering an insurance policy to one whom they knew to be dishonest, enabled him to pretend to be agent for the mortgagee and collect the insurance money, they should suffer the loss, under Civ. Code, § 3543.—Ballard v. Nye, Cal., 69 Pac. Rep. 481.

73. ESTOPPEL—Streets.—The owners of city real estate, selling lots with reference to a plat, held estopped, as against their vendee, from denying the existence of such streets as public highways. — Overland Mach. Co. v. Alpenfels, Colo., 69 Pac. Rep. 574.

74. EVIDENCE—Book Account.—Original entries of book account are admissible in evidence, when authenticated as memoranda contemporaneous with the transactions recorded.—Stephan v. Metzger, Mo., 69 S. W. Rep. 625.

75. EVIDENCE — Damages. — The jury is not bound by the estimates of witnesses as to the damages sustained by one whose land is taken for a street.—Terre Haute & L. Ry. Co. v. Town of Flora, Ind., 64 N. E. Rep. 648.

76. EVIDENCE—Judicial Notice.—Judicial notice will be taken of the fact that the return on safe investments has been continually diminishing for many years. — Collins v. Wardell, N. J., 52 Atl. Rep. 708.

77. EVIDENCE—Statement Made by Agent.—Statements as to a mortgage, made by the agent of the mortgagee to the wife of the mortgagor while fixing up the mortgage, held admissible against the mortgagee. — Krohn v. Anderson, Ind., 64 N. E. Rep. 621.

78. EVIDENCE — Surrender of Preferences. — A surety who has paid the debt of his principal after the latter's bankruptcy is not required to surrender preferential payments received by the creditor as a condition to the proving of his claim.—*In re* New, U. S. D. C., N. D. Ohio, 116 Fed. Rep. 116.

79. EVIDENCE—Taxation. — The minutes of the meeting of the taxing board are not conclusive, and the real facts may be shown, even though they add to or contradict the

record of the taxing board. — State v. Aldridge, Ohio, 64 N. E. Rep. 562.

80. EVIDENCE—Unstamped Instruments. — The United States statute prohibiting the introduction of unstamped notes in evidence applies only to courts of the United States.—Wade v. Curtis, Me., 52 Atl. Rep. 762.

81. EVIDENCE — Unstamped Note.—An unstamped note cannot be excluded as evidence on a trial in the state court for want of the war revenue stamp provided by Stat. 30, c. 448, §§ 13, 14. —Wade v. Foss, Me., 52 Atl. Rep. 640.

82. EVIDENCE—Value of Property.—Testimony of a witness to the value of a piano in controversy held admissible, though he did not know of similar sales in the same year.—Lines v. Alaska Commercial Co., Wash., 59 Pac. Rep. 642.

83. EXECUTION — Restraining Levy. — Where land is levied on under execution against one other than the holder of the legal title, the latter may have a temporary injunction restraining sale. — Einstein v. Bank of California, Cal., 69 Pac. Rep. 616.

84. EXECUTORS AND ADMINISTRATORS — Adverse Possession. — The possession of a decedent's land, which is adverse to the widow alone, prior to assignment of her dower, extends only to the land which the statute allows her to hold until dower is assigned. — Reagan v. Hodges, Ark., 69 S. W. Rep. 581.

85. EXECUTORS AND ADMINISTRATORS—Claims against Decedents.—In view of Orphans' Court Act Revision 1898, p. 740, § 72, where an estate has been settled, but not distributed, the executor is a necessary party to a suit in equity brought to charge legatees or devisees with payment of a claim against decedent.—Loehnberg v. Loehnberg, N. J., 52 Atl. Rep. 710.

86. EXECUTORS AND ADMINISTRATORS — Suit Against Devisees. — Until a claim against decedent's estate is established, a bill will not lie to enforce payment against the legatee or devisees. — Loehnberg v. Loehnberg, N. J., 52 Atl. Rep. 710.

87. EXECUTORS AND ADMINISTRATORS — Judgments.—Where a suit is against an executor, judgment should be entered up against the goods and estate of the testator.—Ticonic Nat. Bank v. Turner, Me., 52 Atl. Rep. 793.

88. EXECUTORS AND ADMINISTRATORS — Rejection of Claim.—The fact that an executor rejects a note presented as a claim against the estate does not authorize suit on the note before its maturity.—Radue v. Pauwelyn, Mont., 69 Pac. Rep. 557.

89. FALSE IMPRISONMENT — Damages.—Where plaintiff was arrested under an illegal tax warrant and detained 13 days, held, that damages to the extent of $100 will be allowed.—Jacques v. Parks, Me., 52 Atl. Rep. 768.

90. FORGERY—Intent to Injury.—An intent to injure or defraud is an essential element of forgery of a writing as a crime.—Krup v. Corley, Mo., 69 S. W. Rep. 609.

91. FRAUDS STATUTE OF — Oral Agreement. — An oral agreement to procure certain shares of stock and transfer them to defendant, on his promise that a corporation would purchase certain land belonging to him, held void as within the statute of frauds.—Crafton v. Carmichael, Ind., 64 N. E. Rep. 627.

92. FRAUDULENT CONVEYANCES — Intent. — Where a daughter conveyed realty to her parents to put it beyond the reach of creditors, the law presumes that they were aware of her fraudulent intent.—Robson v. Hamilton, Oreg., 69 Pac. Rep. 651.

93. GAMING—Brokers. — In a suit by brokers for commissions on sales of stock made in New York by plaintiff's correspondents, the sales held New York contracts governed by the laws of New York. —Gaylord v. Duryea, Mo., 69 S. W. Rep. 607.

94. GARNISHMENT—Fraudulent Conveyance.—Funds in the hands of a trustee for the benefit of certain preferred creditors can be reached by garnishment, where the deed under which he claims is fraudulent as to other creditors, Hungerford v. Greengard, Mo., 69 S. W. Rep. 602.

95. GAS—Negligence. — A gas company held liable for injuries from negligence in connecting a gas stove.—United Oil Co. v. Roseberry, Colo., 69 Pac. Rep. 588.

96. GRAND JURY—Confessions. — The admission of evidence of grand jurors, showing a confession by accused after being properly warned, is not erroneous, or in violation of White's Ann. Code Cr. Proc., art. 404.—Grimsinger v. State, Tex., 69 S. W. Rep. 583.

97. HOMESTEAD—Abandonment.—Where the owner of land on which he has been living rents it for a series of years, and moves away, without reservation of any part of the dwelling for use as his residence, and without filing a claim of homestead exemption, as provided by Code, § 2065, he thereby abandons his homestead in the premises.—Bland v. Putman, Ala., 32 So. Rep. 616.

98. HOMICIDE—Principals. — A defendant in homicide, who, knowing the criminal intent of another, keeps watch while the latter commits the crime, is guilty of first-degree murder. — Grimsinger v. State, Tex., 69 S. W. Rep. 583.

99. HOMICIDE—Self-Defense. — On an indictment for murder, the presence of a specific intent to take life is not alone conclusive that the act was done with deliberation and premeditation.—State v. Bonofiglio, N. J., 52 Atl. Rep. 712.

100. HUSBAND AND WIFE—Suretyship.—Where the only consideration for the note of a married woman is properly conveyed to another, the title not resting in her, she is only a surety, and the note is void as to her. — Cook v. Buhrlage, Ind, 64 N. E. Rep. 603.

101. INDICTMENT AND INFORMATION—Election Between Counts.—Where a complaint charged three offenses, and a conviction could have been had on more than one, the state was not required to elect.—State v. Tucker, Conn., 52 Atl. Rep. 741.

102. INDICTMENT AND INFORMATION— Robbery.—Where an indictment for robbery contained three counts, charging the taking in the first of 30 cents, in the second of a bunch of keys, and in the third of a knife, the state could not be required to elect. — Nevill v. State, Ala., 32 So. Rep. 596.

103. INSURANCE—Age of Applicant. — In an action on a beneficiary certificate, where the defendant alleged that applicant fraudulently misstated her age, the burden was on plaintiff to prove her age as stated, and on defendant to prove the fraud. — Murray v. Supreme Lodge of New England Order of Protection, Conn., 52 Atl. Rep. 722.

104. JUDGMENT—Action to Dispossess. — Judgment for rent held not a bar to defense of tenant in action for dispossession for failure to pay subsequent month's rent.—Seigel v. Neary, 77 N. Y. Supp. 854.

105. JUDGMENT—Contract of Sale — A positive assertion of ownership of a judgment in open court four months after the purchase thereof held an election, and a waiver of the right to rescind.—Hume v. John B. Hood Camp Confederate Veterans, Tex., 69 S. W. Rep. 643.

106. JUDGMENT—Decree on Demurrer.—A decree rendered on demurrer is conclusive only upon matters put in issue by the pleadings. — Ohio River R. Co. v. Fisher, U. S. C. C. of App., Fourth Circuit, 115 Fed. Rep. 929.

107. JUSTICES OF THE PEACE—Sufficiency of Transcript. —Under Code, § 484, it is sufficient if a justice of the peace on appeal returns all the papers, with the statement required by the statute. — Hardee v. Abraham, Ala., 32 So. Rep. 595.

108. LANDLORD AND TENANT — Assignment of Rents.— An assignment of rents of a building to a creditor, subject to a deed of trust, charges the creditor to first apply the rents to the payment of the trust deed —Bredell v. Fair Grounds Real Estate Co., Mo., 69 S. W. Rep. 635.

109. LIFE ESTATE—Liability to Remainderman.—A testamentary trustee, appointed to pay one for life the income of a bequest, who receives the total amount of the bequest, is liable to the remainderman for such amount.— Fitzgerald v. Rhode Island Hospital Trust Co., R. I., 52 Atl. Rep. 814.

110. MALICIOUS PROSECUTION—Civil Action.— Where a civil action was instituted three times, but dismissed

without trial, no action for malicious prosecution thereof would lie.—Hurgren v. Mutual Life Ins. Co., Cal., 69 Pac. Rep. 615.

111. MALICIOUS PROSECUTION—Compromise —Where a criminal case is dismissed pursuant to a written agreement between defendant and prosecutor, defendant cannot thereafter sue prosecutor for malicious prosecution.—Russell v. Morgan, R. I., 52 Atl. Rep. 809.

112, MANDAMUS—Duty of Official Stenographer. — *Mandamus* may lie to the official stenographer of a court to do an official act; it not being necessary that it be to the court to compel him to do it. — Keady v. Owers, Colo., 69 Pac. Rep. 509.

113. MANDAMUS — Private Action. — A private citizen, where the attorney general has not become such, may be a relator in *mandamus* to enforce a public duty.— State v. Nash, Ohio, 64 N. E. Rep. 558.

114. MARRIAGE—"Celestial Marriage." — Judicial notice will be taken of the creed and general doctrine of the Mormon Church, and of the principles of "celestial marriage," peculiar to such church. — Hilton v. Roylance, Utah, 69 Pac. Rep. 660.

115. MARRIAGE—Mormon Church. — The sealing ceremony of the Mormon Church, when in good faith participated in by parties believing therein, creates a valid common-law marriage; the part of such ceremony relating to marriage in eternity being mere surplusage. — Hilton v. Roylance, Utah, 69 Pac. Rep. 660.

116. MASTER AND SERVANT — Assumption of Risk. — A servant has a right to assume that the master will use reasonable care to make the appliances and place to work safe, and is not required to exercise ordinary care to ascertain their condition, but assumes the peril only from such defects as are known to him or plainly observable by him.— Rockport Granite Co. v. Bjornholm, U. S. C. C. of App., First Circuit, 115 Fed. Rep 947.

117. MASTER AND SERVANT—Assumption of Risk. — The risk of injury from a defective roadbed held not among the risks assumed by a trainman, unless it becomes known to him or he could have observed it. — Smith v. Erie R. Co., N. J., 52 Atl. Rep. 634.

118. MASTER AND SERVANT—Contributory Negligence.—Where a servant is killed while attempting to operate an elevator, he knowing the danger and having been warned thereof, his contributory negligence precludes recovery. —Hyde v. Mendel, Conn., 52 Atl. Rep. 744.

119. MASTER AND SERVANT—Fellow-Servant.— Where a servant is injured by a fellow-servant's negligent performance of some of the master's duties intrusted to him by the master, the master is liable — Hough v. Grants Pass Power Co., Oreg., 69 Pac. Rep. 655.

120. MASTER AND SERVANT— Fellow-Servant. — A foreman in a mill, directing an assistant to aid in placing copper rolls on the top of a machine, was acting as a fellow-servant, not as a vice-principal. — Milhench v. E. Jenckes Mfg. Co., R. I., 52 Atl. Rep. 687.

121. MASTER AND SERVANT—Fellow-Servants.—Servants employed to inspect track held not fellow-servants with trainmen.—Smith v. Erie R. Co. N. J., 52 Atl. Rep. 634.

122. MASTER AND SERVANT — Fellow-Servants.—A servant working at the bottom of a mining shaft, operated to hoist ore from the mine for lessees of the levels, and an employee of a lessee allowing ore to fall and injure the former, are not fellow-servants. — Union Gold Min. Co. v. Crawford, Colo., 69 Pac. Rep 600.

123. MASTER AND SERVANT—Negligence.—Where a railroad intrusted the switching of its coaches at a certain point to the yard crew of another road, it was liable for the negligence of such crew in the performance of that duty. — Gulf, C. & S. F. Ry. Co. v. Shelton, Tex., 69 S. W. Rep. 653.

124. MASTER AND SERVANT — Section Foreman.—A section foreman, while transporting his men on hand cars to a place where they are to work, does not act as a vice-principal in giving an order to stop. — Thacker v. Chicago, I. & L. Ry. Co., Ind., 64 N. E. Rep. 605.

125. MECHANICS' LIENS — Waiver. — A party may waive in advance the benefits of the mechanics' lien law. — Keller v. Home Life Ins. Co., Mo., 69 S. W. Rep. 612.

126. MORTGAGES — Assignment. — The purchaser of an equity of redemption cannot require the mortgagee to assign the mortgage upon being tendered the amount thereof.—Lumsden v. Manson, Me., 52 Atl. Rep. 783.

127. MORTGAGES — Assignment of Bonds. — Where a trustee in a mortgage to secure bonds buys some of the bonds with money deposited with him by the mortgagor as further security for the bondholders, the mortgagor may assign the bonds so purchased, subject to the equities of the other bondholders. — Moses v. Philadelphia Mortgage & Trust Co., Ala., 32 So. Rep. 612.

128. MORTGAGES — Conveyance to Mortgagee.—The acceptance of a conveyance of mortgaged property by the mortgagor held not a merger of the mortgage, giving priority to a judgment lien on the land. — Woodhurst v. Cramer, Wash., 69 Pac. Rep. 501.

129. MUNICIPAL CORPORATIONS—Street Improvements. —Assessment for street improvements, under ordinance providing for it without regard to benefits, held void —City Council of Montgomery v. Foster, Ala., 32 So. Rep. 610.

130. MUNICIPAL CORPORATIONS — Taxing Shares of Corporate Stock.—A municipality has no power to assess for taxes the capital stock of a corporation or to increase an assessment thereon once made. — James Clark Distilling Co., v. City of Cumberland, Md., 52 Atl. Rep. 661.

131. NEGLIGENCE — Death of Child. — A railroad company which allowed a circus to show on part of its yard unoccupied by tracks, held not liable for death of a child while making short cut to circus over switch tracks — Clark v. Northern Pac. Ry. Co., Wash., 69 Pac. Rep. 636.

132. NEGLIGENCE — Discovered Peril.—Doctrine of discovered peril held to apply, where the peril was not actually discovered, but might have been by the exercise of ordinary care. — Denver & R. G. R. Co. v. Buffehr, Colo., 69 Pac. Rep. 582.

133. NEGLIGENCE — Of Third Person. — Where the plaintiff was injured by the concurrent negligence of the defendant and a third person, not subject to the plaintiff's control, the defendant cannot avail himself of the negligence of such third person as a defense. — Logansport & W. Val. Gas Co. v. Coate, Ind., 64 N. E. Rep. 638.

134. NEGLIGENCE—Res Ipsa Loquitur.—The doctrine of *res ipsa loquitur* held inapplicable to a case where the evidence showed that defendant was free from blame.—State v. Green, Md., 52 Atl. Rep. 673.

135. NEW TRIAL—Rescinding Order.—Court can rescind an order awarding a new trial and reinstate the judgment. — Hume v. John B. Hood Camp Confederate Veterans, Tex., 69 S. W. Rep. 643.

136. OBSTRUCTING JUSTICE — Attacking Exempt Property. — Where exempt property is taken by an officer contrary to Gen. St., § 1164, the owner can use reasonable force to retake the same.—State v. Hartley, Conn., 52 Atl. Rep. 615.

137. OFFICERS — Laches. — The right of the state to recover on an official bond money for which a state officer fails to account cannot be lost by laches. — Ramsay's Estate v. People, Ill., 64 N. E. Rep. 549.

138. PARTNERSHIP—Duty of Retiring Member —It is the duty of a retiring member of a partnership to notify all those with whom the firm has had dealings of the change in its membership, if he would avoid liability for debts subsequently contracted; and the burden rests upon him to prove such notice.— Neal v. M. E. Smith & Co., U. S. C. C. of App., Eighth Circuit, 116 Fed. Rep. 20.

139. PARTY WALLS—Destruction of Servient Estate.— The right to use a party wall which does not involve any interest in the soil apart from the building is extinguished by the destruction of the building.—Bonney v. Greenwood, Me., 52 Atl. Rep. 786.

140. PLEADING—Negative Pregnant.—A negative pregnant allegation in an answer, admitting by implication a material fact alleged in the complaint, does not operate to

preclude an express denial of such fact from putting it in issue.—Kennedy v. Dickie, Mont., 69 Pac. Rep. 672.

141. PRINCIPAL AND SURETY — Finance Committee — Members of finance committee of a corporation, who signed notes for money borrowed for corporate purposes held to be sureties, and the corporation to be the principal debtor.—Hughes v. Ladd, Oreg., 69 Pac. Rep. 568.

142. PRISONS—Sheriffs.—The sheriff of a county is entitled to the charge and custody of the county jail.—Sturr v. Buckley, N. J., 52 Atl. Rep. 692.

143. PUBLIC LANDS — Fraud Between Applicants.—No one except the state can raise the question of fraud and collusion between applicants for the purchase of state public lands.—Thomson v. Hubbard, Tex., 69 S. W. Rep. 649.

144. QUO WARRANTO—Burden of Proof.—In *quo warranto* by the state, the burden of proof is on defendant to establish his right to hold the office in controversy —People v. Owers, Colo., 69 Pac. Rep. 515.

145. RAILROADS—Injury to Licensee.—An employee of a railroad company, going on the main track with a hand car without any invitation on the part of the company, held a mere licensee, and subject to all the risks incident to the use of the track by the company.—Cleveland, A. & C. Ry. Co. v. Workman, Ohio, 64 N. E. Rep. 582.

146. RAILROADS — Negligence. — Where the evidence only shows that a traveler, with a team approaching a railroad crossing, stopped momentarily a few rods from the crossing, and then drove upon it, there is not sufficient evidence of due care on his part.—Day v. Boston & M. R. R., Me., 52 Atl. Rep. 771.

147. RAILROADS—Trespasser on Track.—Continued use of a railroad track as a footway does not make the users licensees, where repeated protests and warnings against such use are given.—Denver & R. G. R. Co. v. Buffehr, Colo., 69 Pac. Rep. 582.

148. RECEIVERS—Judgment.—Where a receiver is appointed, a judgment in the suit directing the payment of a certain sum to the receiver is not open to the objection that it is in favor of a person not a party to the suit.—Bredell v. Fair Grounds Real Estate Co., Mo., 69 S. W. Rep. 635.

149. RECORDS—Torrens Land Titles —Under Act May 1, 1897, establishing the Torrens system of land title, an application in the prescribed form held sufficient to put in issue validity of adverse title.—Gage v. Consumers Electric Light Co., Ill., 64 N. E. Rep. 653.

150. SALES—Breach of Contract.—In an action for failure to deliver cotton under a contract of sale, it was error to direct a verdict for plaintiff, in the absence of proof of an allegation that the price was tendered defendant.—Sivell v. Hogan, Ga., 42 S. E. Rep. 151.

151. SALES—Failure to Record.—Where ewes were sold, to remain the property of the vendor until paid for, and the vendee gave his note for the price, the transaction was an absolute sale, and the contract a chattel mortgage, void as to third parties if not recorded —Clark v. Baker, Colo., 69 Pac. Rep. 506.

152. SEALS—Scroll.—Under Gen. St., ch. 22, § 14, the addition to the signature of an instrument of a scroll, with the word "Seal," does not make it an instrument under seal.—Providence Tel. Pub. Co. v Crahan Engraving Co., R. I., 52 Atl. Rep. 804.

153. SET-OFF AND COUNTERCLAIM—Mortgage.—A counterclaim may be based on a breach of the contract sued on, though the breach amount to a tort.—Le Clare v. Thibault, Oreg., 69 Pac. Rep. 552.

154. SHERIFFS AND CONSTABLES—Illegal Arrest.—Where a tax collector issued an illegal distress warrant which was void on its face, both the collector and the deputy sheriff serving the writ were liable for the illegal arrest.—Jacques v. Parks, Me., 52 Atl. Rep. 6.3.

155. SHIPPING—Implied Warranty of Fitness of Ship.—In the absence of express contract, there is an implied warranty on the part of the shipowner, in every contract for the carriage of goods by sea, not only that the ship is seaworthy in a general sense at the beginning of the voyage, but that she is seaworthy for the particular voyage and cargo.—The Nellie Floyd, U. S. D. C., E. D. N. Car., 116 Fed. Rep. 80.

156. STATES—Sovereign Powers. — The state is a sovereignty, with sovereign powers, except as limited by the constitution of the United States.— Southern Gum Co. v. Laylin, Ohio, 64 N. E. Rep. 564.

157. STATUTES—Construction.—In construing a statute, if the words used are free from ambiguity and clearly express the sense of the legislature, there is no occasion to resort to other means of interpretation. — Slingluff v. Weaver, Ohio, 64 N. E. Rep. 574.

158. SUNDAY—Overdriving Horse. — In an action to recover damages for the overdriving of a horse, the fact that defendant hired him on a Sunday in violation of Gen St., p. 3707, constitutes no defense. — Newbury v. Luke, N. J., 52 Atl. Rep. 625.

159. TAXATION— Parochial School. — A chapel, used in part for religious worship and in part for the residence of teachers in a parochial school, is not exempt from taxation, under Gen. Laws, ch. 44, § 2.—*In re* City of Pawtucket, R. I., 52 Atl. Rep. 679.

160. TAXATION—Privileges and Franchises.— A tax on privileges and franchises cannot exceed the reasonable value of the privilege or franchise originally conferred or its continued annual value hereafter. — Southern Gum Co. v. Laylin, Ohio, 64 N. E. Rep. 564.

161 TRESPASS—Pleading.—In an action for trespass *quare clausum fregit* possession of the *locus in quo* and *liberum tenementum* may be proved under the general issue. — Louisville & N. R. Co. v. Hall, Ala., 32 So. Rep. 603.

162. TRIAL — Directing Verdict. — Where a contrary verdict would not be allowed to stand, the court may direct a verdict for either party. — Coleman v. Lord, Me., 52 Atl. Rep. 645.

163. TRIAL—Stenographer's Notes. — It is not error for the court to secure from defendant's counsel, after the close of the arguments, a transcript of the stenographer's notes. — Hyde v. Mendel, Conn., 52 Atl. Rep. 744.

164. WAREHOUSEMEN — Liability. — The capacity of a warehouse or the wealth of the warehouseman are not to be considered as affecting the latter's liability for a loss of goods therein.—Denver & R. G. R. Co. v. Peterson, Colo., 69 Pac. Rep. 578.

165. WATERS AND WATER COURSES — Natural Flowage. —The owners of an upper estate cannot be enjoined from permitting waters from their lands to flow their natural way, though a lower estate be thereby injured.—Schwartz v. Nie, Ind., 64 N. E. Rep. 619.

166. WATERS AND WATER COURSES—Riparian Owner — Damage to a riparian owner from the diminution of the flow of water incidental to the cutting of trees by an owner higher up the stream, thus causing an increase of evaporation, is *damnum absque injuria*. — Fisher v. Feige, Cal., 69 Pac. Rep. 618.

167. WILLS—Construction. — The word "also," as used in a will after a clause granting a life interest in certain property, construed to mean "in like manner," and not "in addition to."— Morrison v. Schorr, Ill., 64 N. E. Rep. 545.

168. WILLS—Incapacity to Make.—Where evidence that at times prior to the executing of the will testator had been stupefied with morphine and whisky, held not to necessarily indicate incapacity. — *In re* Gilham's Will, N. J., 52 Atl. Rep. 693.

169. WILLS—Specific Legacies.—Where a part of a specific legacy has been parted with by a testator, the legacy is adeemed *pro tanto* only, and the remainder passes to the legatee.—New Albany Trust Co. v. Powell, Ind., 64 N. E. Rep. 640.

170. WITNESSES—Leading Interrogatories. — A interrogatory asking the witness whether defendant had been asked in his presence to deliver certain cotton, and whether the defendant refused to deliver it, held leading.—Sivell v. Hogan, Ga., 42 S. E. Rep. 151.